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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-1722

TED F. DUNHAM, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, TED F. DUNHAM, JR., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered on March 23, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, as yet unreported, appears at Appendix A, *infra*, pp. 2-20. The opinion of the United States District Court for the Eastern District of Louisiana, on the motion to dismiss the indictment on the ground of the immunity of petitioner, TED F. DUNHAM, JR., is unreported and appears at Appendix B, *infra*, pp. 21-25.

JURISDICTION

The order of judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 23, 1973

(*infra*, Appendix A, p. 1). A timely petition for rehearing and for rehearing *en banc* was denied on May 23, 1973, (Appendix C, *infra*, p. 26). On May 31, 1973, the opinion and judgment issued as mandate, which mandate was recalled and stayed until June 25, 1973, pending the timely filing of this application for a writ of certiorari (Appendix D, *infra*, p. 27).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See also Rule 19(1)(b) of this Court.

QUESTIONS PRESENTED

1. Whether defendant, a natural person, who testifies at the call of the plaintiff in a private civil antitrust suit for treble damages is entitled to the transactional immunity provided by Title 15 U.S.C. § 32?

2. Whether the holding of the Court of Appeals is correct that § 32 immunity can be conferred by virtue of a party's testimony only where governmental involvement or active acquiescence by the Government in the private suit is shown?

3. If governmental involvement or acquiescence is a requisite to an assertion of the § 32 immunity defense in a criminal porceeding in which there has already been taken in a civil suit a deposition of natural person, a party defendant in the criminal proceedings, whether the Court of Appeals erred in failing to hold that the record showed such involvement or acquiescence, or in refusing to permit petitioner to supplement the record with further relevant testimony adduced on petitioner's motion to dismiss which was made and heard in the Trial Court, or in failing to remand this cause as to petitioner TED F. DUNHAM, JR., for an evidentiary hearing into the issue of the Government's involvement or active acquiescence?

STATUTORY AND RULES PROVISIONS INVOLVED

This case involves § 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 2; § 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15; and the Act of February 25, 1903, 32 Stat. 854, 903-904, 15 U.S.C. § 32, which latter reads thus:

> "No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: **Provided,** That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. Feb. 25, 1903, c. 755, § 1, 32 Stat. 904."

Appendix E, *infra*, pp. 28-29.

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be presented to this Court in a summary fashion.

Petitioner's business competitor, Altex Ready-Mixed Concrete Corporation of Baton Rouge, Louisiana, filed a civil antitrust suit for treble damages against petitioner, his corporate interests and certain other individuals not parties to this petition. *Altex Ready Mixed Concrete Corp. v. Ted F. Dunham, Jr., et al.*, Civ. Action No. 67-41 (E.D. La., filed Feb. 1967). The plaintiffs in that civil suit thereafter deposed petitioner TED F. DUNHAM, JR., after issuing a Notice of Deposition, on three separate occasions: April 24, 1967; July 11, 1967; and January 19, 1968. The subject matter of the

testimony elicited during the first two depositions correspond with that of the first four Counts of the indictment; that of the third deposition corresponds with the subject matter of Count V of the indictment.

All defendants, following the return of the indictment herein, moved for dismissal of the indictment on the ground of immunity under 15 U.S.C. § 32. A hearing was had on these motions, and on May 13, 1970, the Trial Court denied the defendants' motions. The corporate defendant's motions were denied on the ground that § 32 immunity is limited to "natural" persons by 15 U.S.C. § 33. The corporations conceded the validity of this part of the judgment. Petitioner, TED F. DUNHAM, JR., has vigorously asserted his immunity defense at all stages of the proceedings herein. The Court of Appeals "assume[d] that Dunham's deposition testimony would qualify him for immunity if the immunity statute is applicable." Appendix A, *infra*, p. 3.

The Court of Appeals held that the immunity statute was inapplicable to petitioner, DUNHAM, saying that in order for it to be applicable there would have to be shown governmental involvement or active acquiescense by the Government in the privately prosecuted antitrust suit. Appendix A, *infra*, p. 10.

After the Court entered its opinion declaring the Government's involvement in the private civil suit to be material to the inquiry, petitioner filed a petition for rehearing and for rehearing *en banc* and a separate motion to supplement the record with testimony adduced in the Trial Court on his motion to dismiss which showed the following governmental involvement or active acquiescence by the Government in the private civil suit. This testimony was attached to the motion, and it was then on file in the Court of Appeals in an Appendix prepared for use in the interlocutory appeal

from the denial of immunity made on behalf of Edward Grady Partin, a co-defendant in the indictment herein. See *United States v. Edward Grady Partin*, No. 30066 (Summary Calendar), 432 F.2d 556 (5 Cir. 1970). That testimony is attached hereto as Appendix I, *infra*, pp. 37-51.

Wallace Heck, owner of Altex Ready-Mixed Concrete Corporation testified at the hearing on petitioner's motion to dismiss the indictment that he (Heck) went to Washington, D.C., in connection with the civil antitrust action and the facts giving rise to that private suit "several times", (App. I, *infra*, p. 39) between five and ten times. On all but two of those occasions, he met with Mr. Whitley, the Government prosecutor in this case (App. I, *infra*, pp. 47-48). On one occasion when Mr. Whitley was not present, Mr. Heck met with an official of the Federal Trade Commission (App. I, *infra*, p. 40). On the other, Mr. Heck met personally with Mr. Ramsey Clark, then Attorney General of the United States (App. I, *infra*, p. 41). So all but one of these visits to Washington, D.C., were made to the Justice Department in connection with the very matters for which petitioner has been prosecuted and convicted. When Mr. Heck met with the Attorney General, he informed Mr. Clark of the pending private treble damage action against petitioner and others (App. I, *infra*, p. 42). The visit to the Attorney General occurred very early in the succession of trips by Mr. Heck, at either the second or third visit to Washington (App. I, *infra*, p. 41). About a year after Mr. Heck and the Justice Department got together, petitioner, all of his corporate interests in the concrete industry, and some other people were indicted.

The Government itself clearly admits its relationship to the plaintiff in the civil case. This relationship will be better understood in relation to the following events:

The civil suit was filed March 21, 1967.

Depositions of Mr. Dunham were taken April 24, 1967 and July 11, 1967.

Mr. Whitley admitted under oath that he met with Heck, owner of Altex, and Heck's lawyer on December 14, 1967.

Further depoistions of Ted Dunham, Jr. were taken on January 18, 1968, about a month after the meeting between the Government and Altex.

We quote from the hearing on defense motion to dismiss indictment on basis of "fruit of poison tree" evidence obtained from Louisiana Labor-Management Commission of Inquiry, whose procedures had been questioned by the United States Supreme Court in *Jenkins v. McKeithen, et al.*, 395 U.S. 411 (1969):

Question by Defense Counsel

"Q. Will that reflect at whose request this first meeting was held?"

Answer by Mr. Whitley, Government Prosecutor

"A. I understood that you expressed some interest prior to that time. I have before me a memorandum which I personally prepared, directed to the Federal Bureau of Investigation, Director of Federal Bureau of Investigation, dated January 22, 1968, to which I referred to a meeting with Wallace Heck and Drew McInnis, counsel for Altex Ready Mix Corporation, on December 14, 1967."

Pages 17-18 of Transcript.

We refer now to "Memorandum in Opposition to Motion to Dismiss on the Basis of Immunity Arising Out of Testi-

mony in Altex Ready-Mixed Concrete Corporation Versus Ted F. Dunham, et al., Civil Action Number 67-41" filed by the United States Justice Department and dated October 31, 1969. Then, as now, the government said that the personal immunity provided by Section 32 of Title 15 USC has no application to private litigation, and added that the depositions did not incriminate Mr. Dunham. The memorandum continues:

> "On December 14, 1967, representatives of Altex Ready-Mixed Concrete Corporation brought this same complaint to attorneys of the Antitrust Division of the Justice Department. On January 22, 1968, the Federal Bureau of Investigation was requested by the Antitrust Division to interview representatives of 14 industrial contracting firms identified by the complainants as being purchasers or potential purchasers of concrete products who had elected to purchase their concrete requirements from the Dunham companies at premium prices rather than deal with Altex and run the risk of recurring labor difficulties with Teamsters Local Union #5. On or about April 10, 1968, Antitrust Division attorneys concluded that the results of the inquiry by the Federal Bureau of Investigation had provided evidence sufficient to justify presentation to a federal grand jury. Authority to present the matter to a grand jury was requested from the Attorney General on May 1, 1968, and the grand jury investigation began on June 19, 1968. * * *"

> [What preparatory work was done by the Government before the jury was empanelled, we do not know, but from the Government's own statement it was instigated by the plaintiff in the civil action case and part of the depositions were taken after the meeting between the Government and the plaintiff. Further, we know that the Court of Appeals relates the indictment to depositions.]

The Government's brief continues:

> "The documentary material made available to the antitrust staff and to the grand jury included a copy of the Supplemental and Amended Complaint filed in the aforesaid private antitrust damage action by the plaintiff Altex on March 21, 1967. Thereafter, at various times during the course of the grand jury's investigation, counsel for the Dunham interests as well as counsel for Altex voluntarily made available to the antitrust staff copies of transcripts of depositions taken in the private suit. The Government encouraged a candid exchange of views in an effort to evaluate the various claims and counterclaims involving the situation in Baton Rouge. However, at no time were counsel for the Government consulted by either the plaintiff or the defendants in the private suit as to any phase of the discovery to be undertaken."

A motion was filed to "Quash Indictment or Supress Evidence"

> "on the grounds that the grand jury returning the indictment herein utilized information garnered by the Louisiana Labor Management Commission of Inquiry, or, in the alternative, that such evidence produced before the Louisiana Labor Management Commission of Inquiry be suppressed at the trial of this matter."

As noted, the Government felt it necessary to disassociate itself from a Louisiana Board of Inquiry. To do so it again emphasized its correlation of activities with the plaintiff in the civil suit.

> "The facts are that the Government's investigation underlining the indictment was initiated upon complaints of Baton Rouge businessmen conveyed to the antitrust staff on December 14, 1967.

[The Baton Rouge businessmen were Mr. Heck and his lawyer, as noted above.]

"The staff was authorized to proceed with a preliminary inquiry on January 9, 1968. * * *

"Thereafter on January 22, 1968, the Federal Bureau of Investigation proceeded to interview representatives of 14 of the contracting firms identified by the complainants for the purpose of verifying the complaints and providing an evidentiary basis for requesting a grand jury investigation into this matter. Incidentally, the instructions to the Federal Bureau of Investigation with respect to each company to be contacted was taken directly from the documented presentation submitted by the initial complainants."

Thus the record is clear of the involvement of the government with the plaintiff in the Civil Damage suit.

We ask the Court to note the following:

"* * * It was stipulated (in the evidentiary proceedings in this Court on defendant's original motion) that after the complaint in the civil suit was filed, attorneys for plaintiffs met with Antitrust Division attorneys and complained about Dunham's pricing practices in the concrete industry and Partin's role of assisting Dunham in Baton Rouge. Leads were furnished the Department of Justice by plaintiffs' representatives and an investigation was instituted (Tr. 149-151). Heck, the owner of the plaintiff in the private suit (Tr. 157-158), testified that he made several trips to Washington, D.C. to discuss various aspects of the ready-mix business in Baton Rouge, including the fact that labor trouble caused by Partin's union was causing his corporation to lose customers (Tr. 159-166) . . ." Government's Brief in *Edward Grady Partin vs. United States of America*, No. 30066 (5 Cir., dismissed for non-prosecution), at page 19.

The Court of Appeals denied petitioner's motion to supplement the record with the testimony of petitioner's competitor which showed the interaction of Mr. Heck, party plaintiff in the civil suit, and the highest officials in the Justice Department, including the prosecutor in this cause. It did not remand this cause to the District Court for additional evidence on the issue of the Government's involvement or active acquiescence in the civil suit. By ignoring the relevant evidence with which petitioner sought to supplement the record, the Court of Appeals apparently determined that the level of activity or deliberate inactivity was insufficient to confer immunity under the statute as that Court construed it.

REASONS FOR GRANTING THE WRIT

I. This case presents an important question of Federal law which has not been, but should be, settled by this Court. Any relevant opinions of this Court compel a different result than that reached by the Court below.

The Court of Appeals said (App. A, *infra*, p. 10):

> "Although we were told that this is the first case to present to an appellate court the question of whether a private plaintiff may confer Section 32 immunity, the available case law almost uniformly supports the Government's position in this case.* * *"

The Court then proceeded to point out that *United States v. Welden*, 377 U.S. 95 (1964), held that Section 32 immunity applied only to persons testifying in judicial proceedings and did not apply to persons testifying before committees or subcommittees of Congress. This case is not opposed to the position of petitioner. It supports petitioner, for it was in a judicial proceeding - a discovery deposition taken by a plaintiff - that Dunham gave testimony.

The Court below cited *United States v. Monia*, 317 U.S. 424 (1943), for its holding that a witness who, under subpoena, testified before a grand jury about an alleged Sherman Act violation obtained immunity from prosecution for that offense, even though he did not claim his Fifth Amendment privilege against self-incrimination. While this case is not dispositive of petitioner's rights in the premises, rather than being adverse authority it impels a conclusion favorable to petitioner. A discovery deposition proceeding is no less a judicial proceeding than is a grand jury inquiry. *Monia* holds that one does not have to move to quash a subpoena or notice of deposition or any other process which brings him to a proceeding involving the antitrust laws and compels his testimony. These two cases were again cited for the proposition that the decision to grant immunity under Sections 32 and 33 was not intended to be left to private citizens, quoting the following language from the *Welden* case, *supra*, at 106:

> "*United States v. Monia*, 317 U.S. 424, 429-30, recognized that 'the sole purpose' of the 1960 statute [15 U.S.C. § 33] was to limit immunity to persons 'who, in obedience to a subpoena, testified or produced evidence under oath,' so that the decision whether or not to grant immunity would be that of the appropriate 'Government officials,' rather than of private citizens anticipating indictment."

But this Court has recognized grants of immunity arising from situations in which the Government seeking to prosecute had no control over the decision to immunize. See, *e. g.*, *Murphy v. Waterfront Com'n*, 378 U.S. 52, 77-78 91964). And, although the case was not brought to this Court, it has been decided that one Governmental official who is totally unaware of on-going legal proceedings may immunize a person from criminal prosecution under the immunity provisions of 15 U.S.C. § 32 by merely subpoenaing him and requiring him to testify or produce a single document relevant to an

antitrust case. *United States v. Charles Pfizer & Co.*, 245 F. Supp. 801 (S. D. N. Y., 1965). This case indicates even that no "decision" to immunize from prosecution is necessary. Not one case originating in this Court was found by petitioner, the Government or the Courts below which squarely controls this case. As above shown, the opinions of this Court, relied on as adverse authority by the Courts below, are not at all adverse to petitioner's assertion of immunity.

Although there is *dictum* in some cases which seem to support the Government, analysis of the cases, be believe, shows the contrary conclusion. The Court below quoted out of context the following *dictum* from *H. Wagner & Adler Co. v. Mali*, 74 F.2d 666, 670 (2d Cir. 1935):

> "It would be an amazing thing to allow a private suitor to confer immunity upon a defendant or other witness by calling him in a private action."

In that case defendants in a civil case resisted discovery on the basis that the information might be used against them in a criminal proceeding. It was argued that Title 15 § 32 would give immunity and the Court found that the immunity of the statute is expressly limited to "any proceeding, suit, or prosecution under Sections 1 to 27, inclusive of this Chapter." The Court then said: - "Section 72, upon which the first cause of action is based, is not included." For that reason alone it would have been necessary to prevent the discovery, and this is the holding. As to the remainder, what the Court said, which we consider to be *dictum*, was: - "Even as to the second cause of action, it is highly doubtful whether Section 32 would accord immunity." The Court did not decide whether Section 32 would accord immunity, and the expression quoted by the Fifth Circuit was not the decision of the Court.

It is significant to note that *Wagner* was decided eight years before the *Monia* case reached this Court. Had *Monia* been decided before *Wagner*, clearly the erroneous *dictum* would have been avoided.

The Court below cited also, as support for its position that petitioner was not entitled to § 32 immunity after testifying, the case of *E. H. Rohde Leather Co. v. Duncan & Sons*, 15 F. 2d 103 (W. D. Wash., 1926). That case, however, like the *Wagner* case, *supra*, was decided in the context of a motion to dismiss a civil suit and demurrers to a bill of discovery, that is, in the face of opposition to the plaintiff's quest for incriminating information. This case was between corporations to recover three-fold damages. The plaintiff filed a bill of discovery to which the defendant objected. The Court held that: - "In the present case it is enough to say, so far as the corporate defendants are concerned, that there is no provision for immunity." So far as the natural persons were concerned, the Court cited *United States v. Standard Sanitary Manufacturing Co.*, et al., 187 F. 232, in which "it was held that this Section was applicable in civil as well as criminal cases, but also held that it would not apply to witnesses called by the defendant. In both of the foregoing cases the United States was a party. The United States is not a party to the present suit, yet plaintiff, in support of the bill of discovery, contends for a rule that would bar the United States from prosecuting any of the defendants who answered the interrogatories." (Emphasis supplied) The Court in *Rohde* did not meet this problem head on. Instead it said: - "If section 8578 grants immunity to any witness not called by the government, which in 187 F.232, supra, it was held it did not, it would require a stronger showing of necessity for discovery that does the present bill before the disclosure asked of defendants should be required."

In *United States v. Standard Sanitary Manufacturing Co., et al., supra,* the Court said only so far as this point is concerned that if defendants could call one another as witnesses and gain immunity, such conclusion "would result in practically wiping out the criminal provision of the Sherman Act for this would enable a defendant in a civil suit under the Act to be called as witness for a co-defendant and thereby become immune against the conviction under the indictment, and one defendant could call the others, until they brought about an immunity of all the defendants in the indictment." We agree. *U.S. v. Monia, supra*; *U.S. v. Welden, supra; H. Wagner & Adler Co. v. Mali, et al., supra*; *E. H. Rohde Leather Co. v. Duncan & Sons, supra*; and *Rutherford v. United States,* 365 F.2d 353 (9 Cir.), cert. den. 385 U.S. 987 (1966).

In that case the witness seeking immunity had been called by the defendant and he did not get immunity. It so happens that the plaintiff there was the United States but the ruling was **NOT** that the immunity applied only to a witness called by the United States. The ruling was that one defendant could not confer immunity on another defendant by calling him as a witness. The distinction is important. The holding in *U.S. v. Standard* still stands, but the reasoning now ascribed to it was not the reasoning of that Court.

It is significant, in petitioner's view, that *Wagner* and *Rohde,* both *supra,* were decided in the context of asserted privilege in a civil case, whereas, this case arises **after** testimony is taken in such a case. The one situation deals with what a party may do to avoid incriminating himself (which this Court, in *Monia,* held was not necessary to claim of § 32 immunity), whereas this case presents the question of what are one's rights, privileges, and immunities, under § 32, after he has testified under subpoena in a private antitrust suit. Since *Monia* holds he does not have to assert his Fifth Amendment privilege and that he may safely rely on the statutory

immunity conferred by 15 U.S.C. § 32, that case, rather than *Wagner* and *Rohde*, it is submitted, controls here.

The Government argued to the Courts below that defendants had somehow shown an ambiguity in the statute by saying one defendant could not call another as witness and thereby confer immunity upon him. This by no means suggests an ambiguity in the statute which would require construction or interpretation, but is only recognition of a principle that runs throughout the system of law that it cannot be used to perpetrate a fraud on people or on the law.

There is but one case squarely on point with the instant case, *Sabado-Ollero, Inc. v. United Dairymen's Assn.*, Civ. Ac. No. 7144 (W.D. Wash., Aug. 31, 1970), *mand. ref'd sub nom. United States v. Sabado-Ollero, Inc.*, No. 26,453 (9 Cir. Nov. 13, 1970), but there are other cases with *dictum* favorable to petitioner's position; these latter cases will be first discussed.

Petitioner cited the Court below to *Rutherford v. United States, supra*. In its opinion, the Court below did not discuss the applicability of that case to the instant case. Rather, it merely listed it in a string of citations which authorized the statement that "the courts have historically emphasized the importance of the private antitrust action as a means of achieving the policy goals of the antitrust laws." (App. A. *infra*, p. 8). The *Rutherford* case is important to the decision of this case for the following reasons. It was by likening a damage suit brought by the Government, in its capacity as an offended party rather than its public capacity, to a damage suit brought by a private party (*compare* 15 U.S.C. § 15a, 69 Stat. 282, *with* 15 U.S.C. § 15, 38 Stat. 731) that the Court concluded in *Rutherford* that the witness there involved had obtained immunity by operation of 15 U.S.C. § 32. The Court said (365 F.2d, at 356):

"Our holding is based on the conclusion that a civil antitrust damage action constitutes enforcement of the antitrust laws and is a 'proceeding' or 'suit' within the meaning of 15 U.S.C. § 32.

"These Government damage actions were authorized by Congress in 1955, due in part to a recognition of the large amount of procurement done by the Government, particularly during periods of defense mobilization. The Senate report accompanying the bill which ultimately became 15 U.S.C. § 15a, contains language which makes it clear that Congress considered private antitrust actions to be of prime importance in the enforcement of the antitrust laws and the nation's antitrust policies.

"The Government by statute has been accorded the status of a private party for purposes of instituting damage actions. If private actions generally are viewed as vehicles for enforcing the nation's antitrust laws, it is difficult to conclude that Government damage actions do not also enforce the antitrust laws. * * *" (Emphasis added).

The debate in *Rutherford* between the private party and the Government which was resolved by the Court, was whether § 15 a was "remedial" or "enforcement" legislation. *Rutherford* contended that the injunctive and criminal actions, and not the civil damage actions, were enforcement proceedings and that the damage action was merely remedial. The Government contended in response that *Rutherford's* definition of what constitutes an enforcement action, in which § 32 immunity would exist, is too narrow. The Court said unequivocally that "a civil antitrust damage action constitutes enforcement of the antitrust laws and is a 'proceeding', or 'suit' within the meaning of 15 U.S.C. § 32." 365 F.2d, at 356. It made it clear that an antitrust action, whether brought by the Government to redress injuries "in its business or property by reason of anything forbidden in the antitrust laws" (15 U.S.C. § 15 a) or by a private person to redress injuries

"in his business or property by reason of anything forbidden in the antitrust laws" was an enforcement proceeding. Thus, it is obvious that Congress did not leave this body of law subject to enforcement by the Government alone. Petitioner submits that the opinion below, stating that "private civil actions can only supplement, and not supplant, governmental efforts both civil and criminal," in the enforcement of the antitrust laws is incorrect. As noted by the Court, in *Rutherford, supra*, at 356 n. 3:

> "Fines in criminal antitrust cases are limited to $50,000 and it is often subsequent civil actions which made such conduct truly unprofitable and deter future violations. Inland and Carnation were each fined $20,000 in the criminal prosecution; the Government in its damage action is seeking to recover about $296,000 from these companies."

Significantly, the Government is entitled only to "actual damages" (§ 15a), whereas a private suitor is entitled to "threefold damages" (§ 15). By granting the private suitor the treble damage remedy, Congress hoped to induce that sector of the public which was actually injured to accept some of the responsibility for enforcing this body of law. See *Rutherford v. United States, supra*, n. 3 and accompanying text.

The obvious purpose of the private treble damage suit authorized by 15 U.S.C. § 15 is the same as that of the private civil rights action authorized by Title II of the 1964 Civil Rights Act, *i.e.*, the individual suitor would obtain relief "not for himself alone, but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). See 1955 U.S.C. Cong. & Adm. News, p. 2329:

> "At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforce-

> ment, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble-damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money."

One of the frequent arguments encountered in the course of this case on the point in issue is that, since the *proviso* conferring immunity was appended to an appropriations bill, only the Government, the recipient of the appropriation, could grant immunity. The above quoted passage from the Senate report on its proposed legislation, 15 U.S.C. § 15a, clearly indicates that the private suit was intended to be a form of appropriation since the intent in the Sherman Act authorizing it was to "encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money." And since the substance of 15 U.S.C. § 32 was attached as a proviso and was intended to be permanent legislation, rather than part of an appropriation, it may be regarded that the immunity *proviso* was a separate subject from the appropriations Act of 1903. *Accord. Cella v. United States*, 203 F.2d 783, 790 (7 Cir. 1953), *cert. den.* 347 U.S. 1016 (1954). Had Congress intended that § 32 not be permanent legislation, it would have reenacted the *proviso* with every appropriation to Justice for the enforcement of the antitrust laws. *Compare Cello, supra.* Since it did not, no relevance should be placed on the mere fact that it was a rider on an Appropriations Act.

The legislative history of Section 32 indicates very little about its intended scope. The appropriation was viewed by its sponsors as legislation that would strengthen antitrust enforcement by the Attorney General. 36 Cong. Rec. 411-

412 (1902). The immunity section, however, was itself also intended to facilitate antitrust enforcement. Because it had proven "Extremely difficult to establish the existence of combinations or conspiracies without the testimony of persons who [were] guilty parties thereto," an immunity provision was regarded to have "great utility in aiding in effectively enforcing the antitrust laws." H.R. 1506, 56th Cong. 1st Sess. 2; 33 Cong. Rec. 6478 (1900).

The legislative history of § 33, however, is clearer on the scope of the immunity afforded by § 32. Contrary to the opinion of the Court below that "The legislative history of the 1906 amendment to the immunity statute * * * confirms our view that Congress intended for Section 32 immunity to be granted solely by Government officials," (App. A. *infra*, p. 7) is the action of Congress in rejecting the House version of the bill which "extended immunity only to a person 'who as a witness **on the part of the Government** in any proceeding authorized by any of said statutes, testifies on oath or in obedience to a subpoena produces relevant evidence.' 40 Cong. Rec. 8738 (1906)" (Emphasis added) (App. A., *infra*, pp. 7-8). The declaration of a single Representative, that "[W]e do not intend that any person shall have the power to offer immunity to a witness **except the** Government of the United States . . ." (40 Cong. Rec. 8739 (emphasis added), App. A., *infra*, p. 8) is just not controlling in the presence of the House's vote to accept the Senate bill, in its present form, over the House bill limiting immunity to Government witnesses. Congress had the option of adopting the House bill or the Senate bill. Its adoption of the bill granting general immunity to "a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath" (15 U.S.C. § 33, 34 Stat. 798) speaks for itself. The immunity sections relate to any natural person forced to provide evidence against him-

self in an antitrust proceeding, civil or criminal, private or governmental.

This Court has consistently followed the language of statutes when it is clear. In *Addison vs. Holly Hill Fruit Products*, 322 U.S. 607, 617, 618, 64 S.Ct. 1215, 1221 (1944), Mr. Justice Frankfurter said for the Court:

> "We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another, in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another.
>
> * * *
>
> "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him . . ."

Again, this Court said in *62 Cases, etc., v. United States*, 340 U.S. 593, 596, 71 S. Ct. 515, 518 (1951):

> "After all, Congress expresses its purpose by words. It is for us to ascertain — neither to add nor to subtract, neither to delete nor to distort."

It is clear that Dunham has testified under call by plaintiff in a suit concerning the antitrust laws, and only by deleting words from the statute "in any suit" and by adding words

which do not appear "when the government is a party" can the denial of immunity be supported.

The Court of Appeals observed that its decision would be one of limited effect because Sections 32 and 33 were repealed by Public Law 91-452, Title II, Sections 209, 210, 84 Stat. 929 (October 15, 1970). The Court further observed that under that statute immunity is to be conferred by the District Court only upon the request of the United States Attorney. Under the current statute then, only the government can confer immunity. From this it would appear that **before** the current statute, immunity could be conferred by testimony given in a suit by one other than the Government under the antitrust statutes. A change in the approach of statutes signifies a change in the law. Moreover the decision is not one of limited effect so far as Mr. Dunham is concerned. If immunity has not been conferred by reason of his testimony in the civil case, and the conviction stands and he is imprisoned, the fact that a different kind of law rule would apply to other people will in no wise minimize his punishment. Further, the plaintiff in the treble damage case, from whose impetus the criminal prosecution came, will have established a prima facie case of liability through the means of government, which it was unable to do for itself as shown by the fact that having asked that the case be placed on the trial docket, it did nothing to pursue the case after March 1, 1968. Appendix H, *infra*, p. 36.

A certificate of the Clerk of Court of the United States District Court for the Middle District of Louisiana, which succeeded the Baton Rouge Division of the Eastern District of Louisiana, has certified that Civil Action 67-41, which is still pending, was filed on March 27, 1967; that the last contradictory hearing in Court was on March 1, 1968, but on April 4, 1969, there was a hearing on plaintiff's motion to amend the complaint to dismiss as against Johnston Barrow,

who by then had died; that the case has not been tried, but request for trial was filed February 1, 1968. Appendix H.

Since the Court below has misconstrued and misapplied opinions of this Court which are tangential to, but not on a point with, the instant case, and since the Court has not heretofore decided this important question of Federal law, this Court should grant petitioner's application and issue a writ of certiorari to the Court of Appeals for the Fifth Circuit, and after hearing is had, it should reverse petitioner's conviction and remand this cause for dismissal of the indictment.

II. The opinion below conflicts with an opinion of the Ninth Circuit Court of Appeals, on point, and this Court should grant a writ of certiorari to resolve this conflict among Circuits.

In *United States v. Sabado-Ollero, Inc., et al,* and *Honorable George H. Boldt,* No. 26,453 (9 Cir., Nov. 13, 1970), the Government sought mandamus to compel the District Court, Judge Boldt presiding, to rescind its Order granting immunity to witnesses who applied therefor in a civil antitrust action in which the Government was not a party and in which they had been issued notices of deposition. Apparently, these witnesses were officers or agents for the defendant corporations. An Order was entered on behalf of the one witness who had applied for an Order granting immunity and he subsequently testified. The other witnesses in the case, on the basis of Judge Boldt's ruling on the effect of 15 U.S.C. §§ 32, 33, were prepared to testify. The Government intervened and asked Judge Boldt to vacate and rescind his Order. Judge Boldt, in effect, held the Government was not entitled to the relief sought because the immunity conferred by 15 U.S.C. § 32 operated as a matter of law and was not within his province to grant or deny. The Government, after the one

witness had testified but before any of the others had, applied to the Ninth Circuit Court of Appeals for writs in the nature of mandamus. The Government requested Judge Boldt to stay the discovery proceedings in the private civil suit and he did so pending the Ninth Circuit's ruling on the Government's petition for mandamus. The Ninth Circuit's opinion denying a writ of mandamus said:

> "The Petition for a Writ of Mandamus, filed herein on September 21, 1970, is denied.
> "The District Court's Order of September 22, 1970, temporarily staying further discovery and pretrial proceedings, will remain in effect until December 15, 1970, when certain new and pertinent legislation will become effective. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title II (Oct. 15, 1970), *reprinted in* 39 U.S.L.W. Statutes 33, 34 (Oct. 20, 1970). The District Court may thereafter reconsider the propriety of its Orders of July 17 & 20, 1970.[1]

1. If the Government should undertake to prosecute the one witness who may have given deposition testimony in reliance upon the District Court's Order granting immunity, then the District Court may, and this Court will, if necessary, consider the validity of any such attempted prosecution. (Emphasis added.)

It is upon the clear implications derived from the Ninth Circuit *per curiam*, and upon the reasoning in the opinion of Judge Boldt in *Sabado-Ollero, Inc., supra*, that defendant urges this Honorable Court to reverse the decision of the Court of Appeals in this case.

The clear implications derived from the Ninth Circuit's *per curiam* in *Sabado-Ollero* are (1) that the opinion of Judge Boldt correctly applies 15 USC § 32 and (2) that the person who testified following the judicial compulsion to do so has transactional immunity under the provisions of 15 USC § 32. These conclusions naturally follow from the fact that the Court of Appeals:

1. **Denied the Government's petition for mandamus;**

2. **Continued, in effect, the District Court's Order staying further discovery; and**

3. **Gave clear warning to the Government that it would entertain applications for relief from prosecution instituted against the witness who had already testified in reliance upon his Section 32 immunity.**

The Court of Appeals would not have continued in effect an illegal order. If the Appellate Court considered Judge Boldt's Order to be contrary to law, then it would have reached the merits of the point and struck down the offensive order. The language of the footnote to the *per curiam* is equally compelling of the conclusion that when one testifies under subpoena in a private civil antitrust treble damage action, he receives complete transactional immunity from prosecution for any act, matter or thing concerning which he testified. The Ninth Circuit clearly warned the Government, and specifically indicated agreement with Judge Boldt, that a prosecution against one who had testified in a civil suit brought under the antitrust laws prior to the effective date of the repeal of 15 USC § 32 is invalid under the terms of the statute as it existed at the time the testimony was elicited. The Appellate Court's declaration of readiness to review, in advance of any trial, the legality of the Government instituting such a prosecution should be interpreted as an intended statement of emphatic warning to the Government that such a conviction would be prevented as illegal. The willingness of the Court to review the validity of instituting such a prosecution in advance of trial is reflected by the Court's use of the term "attempted prosecution" in the footnote. A prosecution reviewed in the ordinary course of proceedings, *i.e.*, following a conviction, would not be a review of an "attempted" but a "completed" prosecution. Obviously, such an em-

phatic statement of willingness to review the question of the validity of even instituting such a prosecution has the earmarks of a prediction of doom for such "attempted" proceedings. It is only in the case where a defendant has been extremely wronged that a Court of Appeals will entertain an application for extraordinary relief from the denial of a motion to dismiss an indictment.

The Fifth Circuit said of this opinion that it is one "which has limited precedential content." (App. A, *infra*, pp. 11.)

Of the Ninth Circuit's opinion, the Fifth Circiut said (App. A, *infra*, p. 12):

> "In a *per curiam* order, without ruling on the merits, the Ninth Circuit refused the Government's mandamus petition. The witness had already been compelled to testify under the District Court order of immunity, so the Ninth Circuit's order could have been based on the unfairness tht would have occurred if it had not protected a defendant-witness who had been compelled to testify under a District Court order granting him immunity. To this extent, it is not persuasive precedent in this case."

Had the footnote reference been the only matter in the *per curiam* which indicated the Ninth Circuit approved Judge Boldt's order, then perhaps the Court below would have been correct in holding that it was "not persuasive precedent in this case." But that was only one facet of a larger picture. Why would the Court of Appeals for the Ninth Circuit have denied the Government's writ application if the Government had shown a clear entitlement to its issue as against the other potential witnesses? This Court, in several cases, has set out guidelines for the issuance of a writ of mandamus. In *Will v. United States*, 389 U.S. 90, 95 (1967) citing *DeBeers Con-*

sol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945), one of the elements for the issuance of mandamus was the showing by the party seeking the writ of exceptional circumstances amounting to a judicial usurpation of power. Clearly, if the Judge did not have the power to immunize the defendant-witnesses, or in his words to recognize that § 32 itself immunized them, that requisite showing was made. This Court, also in *Will*, quoted from *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943), where it was previously stated that "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so'." Had the District Court acted outside its scope of power, the Ninth Circuit would have granted the writ. It was not a private party applying for mandamus; it was the Government of the United States. That body is seldom denied in the courts that to which it is entitled. The effect of the Ninth Circuit's denial of the writ further indicated that Judge Boldt was under no legal duty to rescind his order granting immunity to all who testified. The Court's action in continuing in effect Judge Boldt's stay order speaks to this point in clear terms. Had Judge Boldt's ruling been incorrect, then as to those witnesses who had not then testified, there was no good reason to continue the stay order. Had they not been entitled to immunity under 15 U.S.C. § 32, then the Ninth Circuit would have declared that and issued its admonition to the Government not to prosecute the witness who had testified. Rather, the Court of Appeals continued in effect Judge Boldt's stay order until specific time; the effective date of "new" legislation — legislation which changed the immunity in antitrust cases from "transactional" to "use" immunity and required that the Government be a party to the grant of immunity. If then existing law had permitted this result, as the Court below said in this case,

then the Ninth Circuit's action was an unwarranted delay of relief to the civil suitors there involved. It apparently viewed the new legislation as permitting the Government to prosecute if it desires and permitting the litigants in the private treble damage action to obtain needed discovery; it apparently viewed the old legislation as foreclosing one or the other. Its continuance of the stay order, it is submitted, was a ruling on the legal merits of the question presented and in that regard did have precedential value in this case. case.

It is noted that in the Ninth Circuit opinion, the Court said that after the effective date of the new legislation, "The District Court may **thereafter** reconsider the propriety of its Orders of July 17 & 20, 1970." (emphasis added) It is respectfully submitted that if Judge Boldt's opinion had been improper, there would have been no need to await the effective date of the new legislation to determine its impropriety. The ruling would have lacked propriety only after the effective date of the new legislation. If the Order granting immunity to all the witnesses who testified was proper until the effective date of the new legislation, and the one witness described in the footnote had already testified, then the statement referring to the witness who had testified "in reliance upon the District Court's Order granting immunity" was only descriptive and not qualifying of the rights under discussion.

Petitioner respectfully submits that the District Court opinion in the *Sabado-Ollero* case, *supra*, was correctly decided by the District Judge and it was expressly approved by the Court of Appeals in the language above analyzed. It is significant to note then that the District Court, in *Sabado-Ollero*, had before it the District Court opinion in this case. Of that opinion, Judge Boldt said:

"The unreported District Court order in *Dun-*

ham **denied immunity to a witness who testified by deposition in a private civil antitrust action. The Dunham order does not analyze the statutory language, makes no reference to the legislative history recited above and does little more than cite the other five decisions listed above. As previously stated, none of these decisions support the contention urged by Justice in the present case.**

> **"For the reasons above stated, this Court holds the immunity for witnesses granted by 15 U.S.C. 32 and 15 U.S.C. 33 apply to private antitrust actions."**

This holding was approved by the Ninth Circuit and rejected by the Fifth Circuit, thus giving sound reason for the grant of certiorari in this case. *Accord*, Rule 19(1)(b), Supreme Court Rules.

III. And finally, the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

For the first time in any case involving an immunity issue, either under 15 U.S.C. § 32 or the Fifth Amendment, the Court below interjected the issue of the amount of governmental involvement or the question of active acquiescence by the Government in the proceedings in which the immunity is asserted to have obtained. Following the interjection of this point into the legal considerations on the question of immunity, the Court below wholly denied petitioner any opportunity to make a showing of the newly required elements, either by supplementing the record with evidence already adduced or by remanding the cause to the Trial Court for a full evidentiary determination of this point.

This Court has never set forth guidelines for decision of a point and then forcelosed inquiry by ignoring evidence

and affirming the conviction. Illustrative of this point is *Jackson v. Demco*, 378 U.S. 368, 393-394 (1964). Such a procedure would totally depart from the accepted and usual course of judicial proceedings. Because this has been done in the Court below, this Court should exercise its power of supervision by granting the writ prayed for herein, hearing the cause, and if the Court below correctly determined that the amount of governmental involvement or active acquiescence is a proper consideration, then it should review the evidence in Appendix F attached hereto or remand the cause to the Trial Court for a full evidentiary disclosure of such involvement.

CONCLUSION

The statutory language of 15 U.S.C. § 32 clearly accords petitioner immunity from the criminal prosecution herein. The legislative history, policy considerations, even the interests of the Government itself in preventing antitrust law violations is well served by the position contended for herein by petitioner. The Ninth Circuit supports petitioner's view; the Court below rejects it. The question presented has never been, but should be, resolved by this Court. The repeal of the transactional immunity statute, and substitution thereof with a use immunity statute, does not make this case any less important to the fair and just administration of the Federal laws. Just as the Court below attributed to the Ninth Circuit the worthy motive of protecting the person who had testified in reliance on the District Court order, such protection should be afforded petitioner who testified in reliance on the provisions of 15 U.S.C. § 32 upon which Judge Boldt based his order.

For these reasons, as amplified in the preceding part of this petition, a writ of certiorari should issue to review the

judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of this petition for a Writ of Certiorari and of the Appendix thereto has been mailed with sufficient postage prepaid to Gerald J. Gallinghouse, United States Attorney, Eastern District of Louisiana, 500 St. Louis, New Orleans, Louisiana 70130 and Wilford L. Whitley, Attorney at Law, Department of Justice, Antitrust Division, Washington, D.C.

Baton Rouge, Louisiana, June _____, 1973.

Victor A. Sachse
Attorney for
Ted F. Dunham, Jr.

2-1722

FILE COPY

Supreme Court, U. S.
FILED
JUN 20 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-1722

TED F. DUNHAM, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 71-2791

D. C. Docket No. CR 32271

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DUNHAM CONCRETE PRODUCTS, INC.; LOUISIANA READY-MIX COMPANY, INC.; ANDERSON-DUNHAM, INC., TED F. DUNHAM, JR.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

Before RIVES, WISDOM and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 23, 1973

Issued as Mandate: MAY 31, 1973

IN THE

UNITED STATES COURT OF APPEALS

No. 71-2791

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DUNHAM CONCRETE PRODUCTS, INC.; LOUISIANA READY-MIX COMPANY, INC.; ANDERSON-DUNHAM, INC., and TED F. DUNHAM, JR.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

(March 23, 1973)

Before RIVES, WISDOM and RONEY, Circuit Judges.

RONEY, Circuit Judge: This case involves a federal statute, now repealed, that is asserted to immunize a defendant from criminal prosecution under the antitrust laws for transactions about which he had testified in a private antitrust case, at a time when the statute was effective. We hold that a proper reading of the statute fails to immunize the defendant, that there is no merit to the claims of error in the grand jury proceedings that produced the indictment, and that the trial proceedings contain no reversible error. We affirm the convictions.

A jury convicted three corporate defendants and their part-owner and manager Ted F. Dunham, Jr. of (1) attempting to monopolize trade in concrete products, in violation of

Section 2 of the Sherman Act, 15 U.S.C.A. § 2, and (2) conspiring to affect commerce by attempting to obtain property through physical violence, in violation of the Hobbs Act, 18 U.S.C.A. § 1951. On the Sherman Act count, Louisiana Ready-Mix Company and Dunham Concrete Products, Inc. were each fined $30,000, Anderson-Dunham, Inc. was fined $40,000, and Ted Dunham was fined $30,000 and was sentenced to six months in prison. On the Hobbs Act count, Louisiana Ready-Mix and Dunham Concrete were fined $5,000 each, Anderson-Dunham was fined $10,000, and Ted Dunham was fined $10,000 and was sentenced to three years in prison, with two and one-half years suspended. Dunham's prison sentences are to run consecutively.

Although all defendants filed a notice of appeal, only Anderson-Dunham, Inc. and Ted Dunham, Jr. have prosecuted their appeals. The appeals of the other two corporate defendants, Louisiana Ready-Mix Company and Dunham Concrete Products, are therefore dismissed. Rule 12(c), F.R.A.P.

I. Immunity

In 1967 Dunham, certain Dunham corporations, and a labor representative were sued in a private antitrust action that sought treble damages for an alleged conspiracy to restrain trade in the Baton Rouge, Louisiana, concrete products market. Dunham was deposed three times by the private plaintiff during the preliminary stages of the civil litigation. The testimony elicited from him in the first two depositions covered matters that later constituted the substance of the Sherman Act violations, and the third deposition dealt with Dunham's knowledge of the alleged Hobbs Act violation. We assume that Dunham's deposition testimony would qualify him for immunity if the immunity statute is applicable. The corporate defendant Anderson-Dunham, Inc., does not claim immunity because the statute specifically applies only to

natural persons and, moreover, a corporation has no Fifth Amendment privilege through which immunity may be asserted. *George Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968).

The question is whether a person, who testifies in a private civil antitrust suit in which the Government has no involvement, is entitled to immunity from criminal prosecution under 15 U.S.C.A. § 32. The Government contends that, because only the Government can grant immunity, the statute does not apply to nongovernment litigation.

Dunham contends that he is entitled to immunity (1) under the wording of the statute, (2) because permitting immunity here would further the legislative purpose of Section 32, and (3) because prior case law tends to support his view of the scope of the statute.

Enacted as part of the general appropriations act of February 25, 1903, Section 32 provides that

> "No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under sections 1 through 7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8 to 11 of this title . . . ."

Act of February 25, 1903, c. 755, § 1, 32 Stat. 904.

We note that this decision will be one of limited effect. Sections 32 and 33, which grant a broad transactional immunity, have now been repealed by Public Law 91-452, Title II, §§ 209, 210, 84 Stat. 929 (October 15, 1970). The current immunity statute, 18 U.S.C.A. § 6002, permits only a nar-

rowed use immunity, and Section 6003(a) explicitly states that immunity is to be conferred by the District Court "upon the request of the United States Attorney." Under the current statute, then, only the Government can confer immunity. Hence, our decision here will affect only appellant Dunham and such other antitrust criminal prosecutions, if any, in which the defendants testified in private litigation prior to October 15, 1970, the effective date of repeal for Sections 32 and 33.

The District Court held that Dunham was not immune under Section 32 from prosecution. This holding was correct. To hold otherwise would be contrary to the wording of the statute, its legislative history, and its purpose.

1. Section 32 was enacted as part of the general appropriations act of February 25, 1903, that declared in part:

> "That for the enforcement of the provisions of the [Interstate Commerce] Act . . . the [Sherman] Act . . . and . . . [the antitrust, provisions of the Wilson Tariff] Act, . . . the sum of five hundred thousand dollars . . . is hereby appropriated . . . to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the Courts of the United States: *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts . . ."

32 Stat 903-904 (1903).[1]

[1]Congress has not enacted Title 15 of the United States Code into positive law, so the Statutes at Large take precedence over the codification. **United States v. Welden**, 377 U.S. 95, 98 n.4 (1964).

The language of the appropriation portion of the statute indicates that the purpose of the appropriation was to fund judicial enforcement activities by the United States. *See United States v. Welden*, 377 U.S. 95 (1964); *United States v. Monia*, 317 U.S. 424 (1943). The money was "to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice . . ." 32 Stat. 904. These Justice Department personnel were "to conduct proceedings, suits, and prosecutions" under the then-current antitrust laws. 32 Stat. 904. In addition, the immunity proviso in question here was appended.

Dunham argues that, if Congress had intended that only the Government be authorized to accord immunity under Section 32, the statute would read "*Government* proceeding, *suit by the United States* or prosecution." We disagree. We think that the "proceedings" to which the statute refers are the same "proceedings" with which the appropriation as a whole is concerned. Thus, since the "proceedings, suits, and prosecutions" referred to in the appropriation section of the bill were those brought by the Justice Department, so also must those terms, when used in the immunity proviso, refer to those "proceedings, suits, and prosecutions" conducted by "special counsel and agents of the Department of Justice."

This reading of the phrase in question has previously been approved by the Supreme Court in another context. In *United States v. Welden, supra*, the defendant in a criminal antitrust prosecution had previously testified under subpoena before a Congressional subcommittee under subpoena about the same matters. Welden moved to dismiss the indictment on the ground of immunity under Section 32, contending that the language in the proviso applying to "any proceeding" encompassed more than the nearly identical language in the previous clause in the statute authorizing court enforcement

by the Department of Justice and was broad enough to cover Congressional investigations. The Supreme Court, however, rejected this contention and stated: "By any common-sense reading of this statute, the words 'any proceeding, suit, or prosecution under said Acts' in the proviso plainly refer to the phrase 'proceedings, suits, and prosecutions under said Acts *in the courts* of the United States' in the previous clause." 377 U.S. at 97 (Court's emphasis). Hence, to read Section 32 as Dunham seeks would require us to read the phrase one way in one clause, and to construe it another way in a subsequent clause. This we cannot do. The phrase must be given the same meaning in both clauses.

2. The legislative history of Section 32 indicates very little about its intended scope. The appropriation was viewed by its sponsors as legislation that would strengthen antitrust enforcement by the Attorney General. 36 Cong. Rec. 411-12 (1902). The immunity section itself was also intended to facilitate antitrust enforecment. Because it had proven "extremely difficult to establish the existence of combinations or conspiracies without the testimony of persons who [were] guilty parties thereto," an immunity provision would have "great utility in aiding in effectively enforcing the antitrust laws." H.R. No. 1506, 56th Cong., 1st Sess. 2; 33 Cong. Rec. 6478 (1900).

The legislative history of the 1906 amendment to the immunity statute, 34 Stat. 798, 15 U.S.C.A. § 33, however, confirms our view that Congress intended for Section 32 immunity to be granted solely by Government officials. Section 33 specifically limited immunity under existing immunity statutes to persons testifying under oath and in obedience to a subpoena. The Senate version of Section 33, S.5769, read substantially like the present statute, but the House version extended immunity only to a person "who, as a wit-

ness *on the part of the Government* in any proceeding authorized by any of said statutes, testifies on oath or in obedience to a subpoena produces relevant eviednce." 40 Cong. Rec. 8738 (1906) (emphasis added). The floor manager of the bill in the House, Representative Littlefield, stated that "[w]e do not intend that any person shall have the power to offer immunity to a witness *except the Government of the United States* . . . ." 40 Cong. Rec. 8739 (emphasis added). Although Congressman Littlefield preferred the House version, he admitted that both the House and Senate bills expressed the same intent and accomplished precisely the same purpose. Thus, Section 33 was intended to limit immunity, including Section 32 immunity, to those instances where a responsible Government official would offer it.

3. Finally, to hold that Section 32 authorizes a private plaintiff to immunize antitrust violators would be to disregard the legislative purpose of the statute. The underlying purpose of the immunity clause was the same as that of the appropriation: to strengthen antitrust enforcement by the Attorney-General.

Dunham argues that, by permitting private plaintiffs to confer Section 32 immunity, Congress would have been strengthening antitrust enforcement by encouraging and by facilitating private enforcement. Although the courts have historically emphasized the importance of the private antitrust action as a means of achieving the policy goals of the antitrust laws, *see, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649 (3d Cir. 1967); *Rutherford v. United States*, 365 F.2d 353 (9th Cir.), *cert. denied*, 385 U.S. 987 (1966); *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964), private civil

actions can only supplement, and not supplant, governmental efforts both civil and criminal. As the Supreme Court stated in holding that a private antitrust decree does not bar a subsequent Government injunction, "it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws." *United States v. Borden Co.*, 347 U.S. 514, 518 (1954). Hence, a construction of Section 32 that would have hindered Government action, civil or criminal, would not be effectuating the legislative intent underlying Section 32.

Dunham's proposed construction of Section 32 might indeed hinder Governmental enforcement of the criminal provisions of the antitrust laws. First, the decision to prosecute or not to prosecute criminal violations of the antitrust laws would become a decision to be made, not by responsible Government officials, but by private antitrust plaintiffs. A zealous antitrust plaintiff could easily immunize an entire industry from criminal prosecution under the antitrust laws.

Second, the possibility of collusive suits must be reckoned with. If Dunham's view of the Congressional intent were correct, co-conspirators could have used each other to confer immunity from criminal prosecution. Dunham discounts this fear contending that the courts could guard against collusive suits by permitting Section 32 immunity to attach only if the defendant had testified or had produced evidence in a bona fide adversary proceeding. The intent of the Act, however, was to ease prosecution, not to complicate it.

Third, under Dunham's view of Section 32, the Government's power to offer immunity in ejchange for information would have been extremely limited. Potential defendants would have had an alternate source of immunity, the private plaintiff, and the Government's power to determine whe'

persons should be prosecuted would have been substantially lessened. Yet this tool to expose anti-competitive conspiracies was, according to one of the drafters of the immunity statute, one of the basic needs underlying the enactment of the statute. *See* H.R. No. 1506, *supra*.

In view of the legislative history and the clear intent of the statute, we hold that Section 32 authorized immunity from criminal prosecution only to the extent that the Government actively acquiesced.

4. Although we are told that this is the first case to present to an appellate court the question of whether a private plaintiff may confer Section 32 immunity, the available case law almost uniformly supports the Government's position in this case. *Welden v. United States, supra,* held that Section 32 immunity applied only to persons testifying in judicial proceedings and did not apply to persons testifying before committees or subcommittees of Congress. *United States v. Monia, supra,* held that a witness who, under subpoena, testified before a grand jury about an alleged Sherman Act violation obtained immunity from prosecution for that offense, even though he did not claim his Fifth Amendment privilege against self-incrimination. In construing 15 U.S.C.A. § 33, 34 Stat. 798 (1906), the 1906 amendment to Section 32, the Court stated in dictum that the purpose of the amendment was "to protect the Government's interests by preventing immunity unless the prosecuting officer, or other Governmental official concerned, should compel the witness' attendance by subpoena and have him sworn." 317 U.S. at 429. *Welden, supra,* restated this view, declaring:

> "United States v. Monia, 317 U.S. 424, 429-30, recognized that 'the sole purpose' of the 1906 statute was to limit immunity to persons 'who, in obediance to a subpoena, testified or produced evidence under

> oath,' so that the decision whether or not to grant immunity would be that of the appropriate 'Government officials,' rather than of private citizens anticipating indictment."

377 U.S. at 106. Thus, both *Welden* and *Monia* indicate that the decision to grant immunity under Sections 32 and 33 was not intended to be left to private citizens.

Several Circuit and District Court cases support this view of Section 32. For example, in a private antitrust suit, *H. Wagner & Adler Co. v. Mali*, 74 F.2d 666 (2d Cir. 1935), the Second Circuit held that the District Court had erred by requiring defendants to answer interrogatories that were possibly incriminatnig. In dictum, the Court stated that Section 32 would not cure the impropriety because it could not confer an immunity from criminal prosecution. According to the Court:

> "[s]ince the body of the statute is concerned with proceedings brought by the Department of Justice, it would seem a natural construction to limit similarly the proviso. Moreover, it would be an amazing thing to allow a private suitor to confer immunity upon a defendant or other witness by calling him in a private action."

74 F.2d at 670. *See also E. H. Rhode Leather Co. v. Duncan & Sons, Inc.*, 15 F.2d 103 (W.D. Wash. 1926).

Dunham relies on two cases, one of which is not on point and the other of which has limited precedential content. The former, *Rutherford v. United States, supra*, held only that Section 32 immunity may be granted to a defendant in a Government suit for monetary damages under the Sherman Act. The Ninth Circuit's holding in *Rutherford* is not inconsistent with our present holding, because there the Government actively participated in the decision to grant immunity.

Dunham's other case is an unreported decision of the District Court for the Western District of Washington, *Sabado-Ollero, Inc. v. United Dairymen's Ass'n*, Civil No. 7144 (W.D. Wash., Aug. 31, 1970), *mandamus ref. sub nom. United States v. Sabado-Ollero, Inc.*, No. 26,453 (9th Cir., Nov. 13, 1970). The District Court there required a defendant to give deposition testimony in a private antitrust suit after being granted Section 32 immunity. The immunized defendant was deposed by the private plaintiff, and the United States applied to the Ninth Circuit for a writ of mandamus to compel the District Court to rescind and vacate its order that granted immunity. In a *per curiam* order, without ruling on the merits, the Ninth Circuit refused the Government's mandamus petition. The witness had already been compelled to testify under the District Court order of immunity, so the Ninth Circuit's order could have been based on the unfairness that would have occurred if it had not protected a defendant-witness who had been compelled to testify under a District Court order granting him immunity. To this extent, it is not persuasive precedent in this case.

II. Grand Jury

Appellants contend that the indictment should have been dismissed because a Government grand jury witness (1) testified before the grand jury as an expert on the antitrust problems of the concrete building materials industry, when in actuality he was not a qualified expert; (2) improperly summarized for the grand jury the Government's presentation; (3) offered an expert opinion to the grand jury on the precise point to be determined by it; (4) improperly referred to an earlier grand jury proceeding by not relating the earlier testimony in its entirety; (5) gave wholly hearsay testimony, based upon other grand jury witnesses' testimony and upon documents subpoenaed by the grand jury and its predecessor;

and (6) was provided copies of grand jury exhibits, without a court order, in violation of Rule 6(e), F.R.Crim.P.

The witness was Ernest Hays, an economist with the Economic Section of the United States Justice Department's Antitrust Division. His specific function before the grand jury was to compare the pay scales and other terms of two Teamsters Union contracts. The contracts themselves (one was with appellant Anderson-Dunham, Inc., the other with a competitor) had already been submitted to the grand jury as exhibits by a previous witness, and Hays' testimony pointed out particular contractual provisions that were more favorable to appellant Anderson-Dunham, Inc. His testimony focused on two subjects: the lower wage scales paid by Anderson-Dunham, Inc. and the absence of an arbitration clause in the Anderson-Dunham labor contract, a clause present in the competitor's contract. Appellants argue that Hays' testimony "improperly influenced" the grand jury's decision to indict.

Upon a careful reading of Hays' grand jury testimony, we conclude that appellants' objections to it are groundless and that the District Court correctly refused to dismiss the indictment.

First, Hays did not testify as an expert; he simply made arithmetical computations and compared the provisions of two labor contracts. At no time was Hays asked his "expert opinion" about anything.

Second, nowhere in Hays' grand jury testimony does he "argumentatively summarize" the Government's presentation. Appellants fail to indicate precisely where this alleged summary may be found, and we must conclude that Hays' testimony was not improper in this respect.

Third, nowhere did Hays offer an expert conclusion on the "precise point" to be determined by the grand jury. His testimony was explanatory and descriptive, and it offered no conclusions based upon expert judgment.

Fourth, appellants contend that Hays' testimony was improper because it made an incomplete reference to testimony given before a previous grand jury. Reading the testimony, we can find only one instance where such a reference was made, and that was where Hays pointed out that, although they reached different numerical results, his arithmetic computations merely confirmed to conclusions of the witness who had testified before a previous grand jury. Appellants cite *In re Grand Jury Investigation of Banana Industry*, 214 F.Supp. 856 (D.Md. 1963), for the proposition that the Government, when referring to testimony heard by a previous grand jury, must read the entirety of the testimony to the current grand jury. Unlike the *Banana Industry* case, though, appellants here can point neither to carefully prepared and highly selective summaries nor to any prejudicial effect from the partial reference. In this context, the partial reference to testimony before a previous grand jury did not constitute a ground for dismissing the indictment.

Fifth, appellants contend that part of Hays' grand jury testimony was hearsay, is therefore incompetent, and consequently was improper. Assuming that this contention is correct, it nonetheless states no legal basis for dismissing the indictment. Courts are not required to dismiss indictments based solely upon hearsay evidence. *Costello v. United States*, 350 U.S. 359 (1956).

Even if Hays' grand jury testimony was that of an unqualified expert, was an argumentative summary, and was opinionated on the precise point or points to be determined

by the grand jury, there would not be sufficient cause for dismissing the indictment.

The rule is clear that Government officials may assist the grand jury in analyzing the evidence before it. For example, in *United States v. United States District Court*, 238 F.2d 713 (4th Cir. 1956), *cert. denied sub nom.* *Valley Bell Dairy Co., Inc. v. United States*, 352 U.S. 981 (1957), the Fourth Circuit held that the grand jury could return a valid indictment even after hearing a digest of testimony prepared by Government counsel. According to the Court, "[i]n investigations of this sort [antitrust], it is necessary that the grand jury have the aid of counsel, not only in examining witnesses but also in digesting the great mass of evidentiary matter produced before them . . . ." 238 F.2d at 720-21. And in *United States v. Rintelen*, 235 F. 787, 791 (S.D. N.Y. 1916), Judge Augustus Hand observed: "Assuming that a grand jury were simply supplied with the witnesses and nothing more . . . what sort of an investigation would be had, or intelligent consideration secured in a difficult or complicated matter?"

An indictment, regular on its face and returned by a legally constituted grand jury, is presumed to be founded on competent evidence, *James v. United States*, 290 F.2d 866 (5th Cir.), *cert. denied*, 368 U.S. 834 (1961), and the law is well established that the submission to a grand jury of some incompetent proof is not a ground for dismissing the indictment. *See United States v. Nunan*, 236 F.2d 576 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); *see also Lawn v. United States*, 355 U.S. 339 (1958) (illegally obtained evidence); *Coppedge v. United States*, 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963) (perjured testimony). Hays' testimony here constituted only a small part of the evidence presented to the grand jury, and appellants cannot, and in fact do not, dispute that at least some competent evidence was presented to the grand jury. That is

sufficient to sustain the indictment. *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964); *Coppedge v. United States*, *supra*.

Finally, as the Sixth point, appellants argue that the indictment should have been dismissed because Hays, without a court order as required by Rule 6(e), F.R.Crim.P., was given access to otherwise secret grand jury exhibits to help prepare his grand jury testimony. Apart from the question of whether appellants have standing to remedy the alleged breach of grand jury secrecy, the remedy in any case would not be to dismiss the indictment. Instead, as courts have recognized, if the Government abuses the grand jury in this way, a contempt citation will be adequate to halt any impropriety and to protect grand jury secrecy. *See, e.g., United States v. United States District Court*, *supra*, at 721; *In Re Petroleum Industry Investigations*, 152 F.Supp. 646 (E.D. Va. 1957).

III. New Trial

Appellants contend that multiple trial errors, alone or cumulated, entitle them to a new trial. We disagree.

1. Appellants argue that the trial court violated their Sixth Amendment Right of Confrontation when it permitted two government witnesses to testify as to declarations of deceased alleged co-conspirators. Appellants complain that "it is impossible to cross-examine a dead man." Out-of-court statements of a co-conspirator, made in furtherance of the conspiracy and during its pendency, have long been held admissible in the federal courts as a settled exception to the hearsay rule. *See Lutwak v. United States*, 344 U.S. 604 (1953); *United States v. Johnson*, 466 F.2d 508 (5th Cir. 1972); *United States v. Harvey*, 464 F.2d 1286 (5th Cir. 1972); *United States v. Williamson*, 450 F.2d 585 (5th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972); *United States v. Fischetti*, 450 F.2d 34 (5th Cir. 1971), *cert. denied*, 405 U.S.

1016 (1972); *United States v. Nall*, 437 F.2d 1177 (5th Cir. 1971); *McGregor v. United States*, 422 F.2d 925 (5th Cir. 1970); *Holsen v. United States*, 392 F.2d 292 (5th Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969); *Orser v. United States*, 362 F.2d 580 (5th Cir. 1966); C. McCormick, Law of Evidence § 244 at 521-24 (1954); 4 Wigmore on Evidence § 1079 (3d ed. 1940); *cf. Dutton v. Evans*, 400 U.S. 74 (1970). The admission into evidence of statements made by a declarant who was dead at the time of trial has also long been permitted. *See, e.g., Mattox v. United States*, 146 U.S. 140 (1892). Accordingly, "[t]he death of a co-conspirator will not render inadmissible statements made by him during the pendency of the conspiracy." 2 Wharton, Criminal Evidence 187 (12th ed. 1955). *See Lewis v. United States*, 38 F.2d 406 (9th Cir. 1930). Admission of these statements did not, therefore, constitute error.

2. Appellants assert that, in the trial court's preliminary instructions to the jury, the court did not give appellants' requested charge as to the distinction between direct and circumstantial evidence, and, according to appellants, the subsequent proper charge given at the close of the trial only confused the jury and did not cure the earlier error. This contention is meritless. Appellants fail to point out any alleged defects in the charge and do not show how the charge harmed them. We have carefully examined both charges, and any possible error in the preliminary charge was surely cured by the subsequent instructions.

3. Appellants object to the testimony of Roland Stevens, a government witness. Stevens testified that, in the years 1955 to 1957, he encountered difficulties in operating a ready-mix concrete company in competition with appellant Anderson-Dunham, Inc. He further testified that, during the same period of time, Dunham attempted to force him to agree to divide the ready-mix concrete market between them. Appel-

lants contend that this testimony was inadmissible because it recounted events remote in time to the period from 1966 to 1969 covered by the indictment. Although criminal defendants may not be convicted for acts occurring prior to the period of time spanned in the indictment, federal courts in antitrust cases have, for the purpose of showing intent, consistently admitted evidence of conduct prior to the time covered by the indictment. *See, e.g., United States v. Reading Co.*, 253 U.S. 26 (1920); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Schine*, 260 F.2d 552 (2d Cir. 1958), *cert. denied*, 358 U.S. 934 (1959); *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957); *American Tobacco Co. v. United States*, 147 F.2d 93 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946); *United States v. Pullman Co.*, 50 F.Supp. 123 (E.D. Pa. 1943), *aff'd by an equally divided court*, 330 U.S. 806 (1947); 2 Wigmore on Evidence § 302 (3d ed. 1940); *cf. Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948); *Panotex Pipe Line Co. v. Phillips Petroleum Co.*, 457 F.2d 1279 (5th Cir. 1972). The jury was here instructed to consider this "background evidence" solely for the purpose of showing the purpose and character of the particular transactions covered by the indictment, so it was proper to admit evidence of a course of conduct engaged in in previous years to assist the jury in attempting to determine whether or not appellants possessed the requisite intent to restrain trade during the years covered by the indictment.

4. Appellants argue that their cross-examination of Wallace Heck, a Government witness, was unduly restricted by the trial court. Heck was an alleged victim of the charged conspiracy, and appellants sought to impeach his credibility by showing that he had settled a state court civil suit that had criminal implications. The trial court correctly sustained Government counsel's objection to this line of questioning,

because only prior convictions of felonies or of misdemeanors involving moral turpitude are admissible in evidence to impeach the credibility of a witness. *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969). *See also Brown v. Coating Specialists, Inc.*, 465 F.2d 340 (5th Cir. 1972).

5. Appellants assert that the trial court erred in reading the indictment to the jury as part of the charge and in permitting the jury to take a copy of the indictment into the jury room. The trial court, both at the beginning of the trial and in its final instructions, specifically instructed the jury that the indictment was not evidence but was merely the formal manner by which the Government accuses a person of a crime. In the light of these clear instrutcions, and in the absence of a timely objection on either point, we hold that the trial court committed no error in reading the indictment to the jury, *see Kroll v. United States*, 433 F.2d 1282 (5th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971), nor did it abuse its discretion by permitting the jury to have a copy of the indictment present during their deliberations, *see United States v. Smith*, 460 F.2d 1323 (5th Cir. 1972); *United States v. Green*, 433 F.2d 946 (5th Cir. 1970).

6. Appellants object to a written message sent by the trial court to the jury. Appellants contend that the message imposed a deadline for reaching a verdict and "blasted them into a conviction." The record does not show, however, what this written message stated, so we cannot speculate about its effects. Appellants did not request that the contents of this message be included in the trial transcript, nor have they sought to supplement the record under Rule 10(c), F.R.A.P. The burden of supplementing the record is on the party seeking to enlarge the transcript, and a failure to comply with Rule 10(c) leaves the matter outside the record. *Browder v.*

United States, 292 F.2d 44 (5th Cir.) *cert. denied*, 368 U.S. 930 (1961). An appellate court cannot go behind the record, *Smith v. United States*, 343 F.2d 539 (5th Cir.), *cert. denied*, 382 U.S. 861 (1965), so appellants' contention must be rejected for want of a sufficient record on appeal. *Cf. Sanford Brothers Boats, Inc. v. Vidrine*, 412 F.2d 958 (5th Cir. 1969).

AFFIRMED.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **DUNHAM CONCRETE PRODUCTS, INC., LOUISIANA READY-MIX COMPANY, INC., ANDERSON-DUNHAM, INC., TED F. DUNHAM, JR., and EDWARD GRADY PARTIN,** **Defendants.**	**ORDER** **No. 1842**

The defendants Dunham Concrete Products, Inc., Louisiana Ready-Mix Company, Inc., Anderson-Dunham, Inc., and Ted F. Dunham, Jr., have moved to dismiss the indictment herein on the grounds of immunity based on the testimony of defendant Ted F. Dunham, Jr. in the private antitrust action of Altex Ready-Mixed Concrete Corp. v. Ted F. Dunham, Edward Grady Partin, et al.

Defendants rely on Section 32, Title 15, U.S.C.A.

The immunity granted by said section applies only to natural persons. As to the rest of the defendants' contentions, see the court's order in reference to defendant Partin's similar motion.

IT IS THEREFORE ORDERED and this does order that defendants' motions to dismiss be and the same hereby are denied.

Done and dated this 13th day of May, 1970.

s/ W. D. Murray
Senior United States District Judge

IN THE DISTRIST COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DUNHAM CONCRETE PRODUCTS, INC., LOUISIANA READY-MIX COMPANY, INC., ANDERSON-DUNHAM, INC., TED F. DUNHAM, JR., and EDWARD GRADY PARTIN,
Defendants.

ORDER
No. 1842

Defendant Edward Grady Partin has moved to dismiss the antitrust indictment herein on the grounds of immunity arising from his testimony before a grand jury in September or October, 1968. Another ground for his motion is that he was, in fact, promised immunity by the federal attorneys conducting the grand jury.

By a separate motion the defendant Partin moved to dismiss the indictment on the grounds that he received immunity by reason of his compulsory testimony in a private civil antitrust action concerning matters covered in this indictment.

Other than his contention that he was in fact granted immunity by federal officers, his motions are based on §32 of Title 15, U.S.C.A.

At a hearing had on defendant's motion, testimony and evidence was presented to the court. The defendant utterly failed to support his position and the court finds that no promise of immunity was made to defendant, and

IT IS THEREFORE ORDERED that the motion to dismiss, based on this contention, be and the same is hereby denied.

Defendant's contention that by virtue of his testimony before the Nashville grand jury and §32 of Title 15, U.S.C.A., he was granted immunity, is based on what is referred to as the "Bergeron incident". Testimony with reference to this incident was received by a New Orleans grand jury investigating antitrust violations some four months before defendant testified before the Nashville grand jury.

The background of the circumstances under which Partin testified before that grand jury is that following his testimony in a trial in which James Hoffa was convicted the defendant Partin has been importuned, offered bribes, intimidated and threatened and otherwise harrassed to force him to recant his trial testimony and to cooperate in efforts to secure a new trial for Hoffa.

The defendant complained of all these matters to federal officers and he was given personal protection by U. S. Marshals.

These complaints by defendant served in part as the basis for an order of the court for the Middle District of Tennessee to convene a grand jury to investigate the attempts "to influence witnesses and obstruct justice".

Defendant testified under subpoena before that grand jury. Among the matters he testified to was the so-called "Bergeron incident" being the same incident before the Nashville grand jury that was testified to by others before the antitrust grand jury in New Orleans. The defendant's testimony was to the effect that the incident was an example of harrassment and intimidation to which he was subjected. The

New Orleans grand jury returned an indictment against defendant, the 5th count of which charged a violation of 18 U.S.C., §1951, and was concerned with a different version of the "Bergeron incident" than testified to by Partin before the Nashville grand jury.

From the whole record, it is clear that unlike U. S. v. Chas. Pfizer & Co., 245 F. Supp. 801 the Nashville grand jury was not "under" the antitrust laws and therefore the immunity statute is not applicable. Nor did his testimony provide or constitute a "necessary link" in the discovery of antitrust violations, and could not result in an inadvertent grant of immunity.

IT IS THEREFORE ORDERED that the motion to dismiss on this ground be and the same is hereby denied.

Defendant's separate motion to dismiss is based on a claim of immunity arising out of testimony by wya of deposition in a private treble damage action under the federal antitrust laws. Altex Ready-Mixed Concrete Corp. v. Ted F. Dunham, et al. Baton Rouge Division of the Eastern District of Louisiana.

I cannot believe that it is intended that the Immunity section has conferred on persons who testify in response to a subpoena in a private civil action immunity from criminal prosecution. There need not be collusion between the parties to observe that such an extra-ordinary grant should be in the clearest terms. When the immunity statute is read as part of a special appropriation for the enforcement of the antitrust laws by the Department of Justice, for §32 of Title 15, U.S. C.A., was not a general statute, it seems clear that its aim was to facilitate enforcement of the antitrust laws by the Attorney General of the United States.

In U. S. v. Welden, 377 U. S. 95, the court commented on the earlier decision of U. S. v. Monia, 317 U. S. 424, as follows:

> "This court in United States v. Monia, 317 U. S. 424, 429-430, recognized that 'the sole purpose' of the 1906 statute was to limit immunity to persons 'who, in obedience to a subpoena, testified or produced evidence under oath,' so that the decision whether or not to grant immunity would be that of the appropriate 'Government officials,' rather than of private citizens anticipating indictment."

The only reported cases which rule on the question of whether §32, Title 15, U.S.C.A., would give immunity in a private antitrust suit have denied that the statute does so grant immunity. E. H. Rohde Leather Co. v. Duncan & Sons, 15 F.2d 103; H. Wagner & Alder Co. v. Mali, et al., 74 F.2d 666.

The case of Rutherford v. U. S., 365 F.2d 353, held that the statute applied to a government witness in a damage suit brought under the antitrust laws by the federal government. The case held that such a civil action brought by the government is an additional means to enforce the law. But that is far from saying that the statute should apply in a treble damage action between private parties.

IT IIS THEREFORE ORDERED that the motion to dismiss be and the same is hereby denied.

Done and dated this 13th day of May, 1970.

s/ W. D. Murray
Senior United States District Judge

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2791

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DUNHAM CONCRETE PRODUCTS, INC.;
LOUISIANA READY-MIX COMPANY, INC.;
ANDERSON-DUNHAM, INC., and TED F. DUNHAM, JR.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 23, 1973, 5 Cir., 1973, ____ F.2d ____).

(May 23, 1973)

Before RIVES, WISDOM and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this paenl nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.71-2791

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DUNHAM CONCRETE PRODUCTS, INC.;
LOUISIANA READY-MIX COMPANY, INC.;
ANDERSON-DUNHAM, INC., TED F. DUNHAM, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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ORDER:

IT IS ORDERED that this Court's judgment previously issued as mandate on May 31, 1973, in the above styled and numbered cause, is hereby recalled and stayed to and including June 25, 1973, pending the timely filing of a petition for writ of certiorari to the United States Supreme Court.

s/ JOHN MINOR WISDOM
UNITED STATES CIRCUIT JUDGE

U. S. COURT OF APPEALS, FILED JUNE 4, 1973
EDWARD W. WADSWORTH, CLERK

APPENDIX E

ACT OF FEBRUARY 25, 1903
32 Stat. 854, 903-904

That for the enforcement of the provisions of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled "An Act to reduce taxation, to provide revenue for the Government, and other purposes," approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided,* [That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.]

The portion in brackets is now 15 U.S.C. 32.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among

the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, **Petitioner,** **v.** **SABADO-OLLERO, INC., McKENNON DAIRY FARMS, INC., et al.,** **Respondents,** **HONORABLE GEORGE H. BOLDT,** **Nominal Respondent.**	**No. 26453** **ORDER**

Before: HAMLEY, ELY, and WRIGHT, Circuit Judges.
PER CURIAM:

The Petition For a Writ of Mandamus, filed herein on September 21, 1970, is denied.

The District Court's Order of September 22, 1970, temporarily staying further discovery and pretrial proceedings, will remain in effect until December 15, 1970, when certain new and pertinent legislation will become effective. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title II (Oct. 15, 1970), **reprinted in** 39 U.S.L.W. Statutes 33, 34 (Oct. 20, 1970). The District Court may thereafter reconsider the propriety of its Orders of July 17 & 20, 1970.[1]

1. If the Government should undertake to prosecute the one witness who may have given deposition testimony in reliance upon the District Court's Order granting immunity, then the District Court may, and this court will, if necessary, consider the validity of any such attempted prosecution.

A TRUE COPY: ATTEST: NOV. 17, 1970
Wm. B. LUCK, Clerk; By Raymond D. Hewitt, Deputy

FILED NOV. 13, 1970, Wm. B. LUCK, CLERK
Filed in the United States District Court
Western District of Washington, Nov. 19, 1970
CHARLES A. SCHAAF, Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SABADO-OLLERO, INC. Corporation; McKENNON DAIRY FARMS, INC., a corporation; MILK BARN, INC., NO. 1; MILK BARN, INC., NO. 2; MILK BARN, INC., NO. 3, and MILK BARN, INC., NO. 4; all corporations, and JOHN GREER, Plaintiffs,	**CIVIL NO. 7144**
vs.	
UNITED DAIRYMEN'S ASSOCIATION, a corporation; CONSOLIDATED DAIRY PRODUCTS, INC., a corporation; DAMASCUS MILK COMPANY, a corporation; d/b/a CARNATION COMPANY: FOREMOST DAIRIES, INC., a corporation; and ARDEN-MAYFAIR, INC., a corporation. Defendants.	**ORDER DENYING MOTION TO RESCIND IMMUNITY ORDERS ENTERED JULY 17, 1970 AND JULY 20, 1970**

In the above civil antitrust treble damage action plaintiffs noticed the taking of the deposition of certain witnesses. Counsel for the witnesses applied for and, after hearing orders were entered confirming immunity to the witnesses under 15 U.S.C. 32[1] and 15 U.S.C. 33[2]. After one of the depositions was taken the Department of Justice (Justice) applied for and was

1. "No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: Provided, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying".

2. "Under the immunity provisions in section 32 of this title, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

granted leave to intervene as **amicus curiae** for the purpose of submitting a motion to rescind the immunity orders on the ground that the immunity provisions of the statutes referred to apply only to antitrust actions, whether criminal or civil, wherein the United States is plaintiff. The motion has been fully briefed and argued.

The precise question presented is whether the immunity provided by the statutes referred to extends to witnesses testifying pursuant to subpoena in private civil antitrust actions. In determining the stated question, the language of the statutes, their legislative history and pertinent decisional authority must be closely and carefully considered.

In the opinion of the Court, the statutory language on its face grants witness immunity in private civil antitrust actions; legislative history strongly indicates it was not the intention of Congress to limit the application of such witness immunity in civil cases to only cases instituted by the Government; and the decisional authority, at best, is inconclusive and not persuasive of the position asserted by Justice in this case.

Statutory Language. There is not the slightest indication in the appropriation bill containing the first immunity provision applicable in antitrust cases, 32 Stat. 903-904 (1903),[3]

3. **"That for the enforcement of the provisions of the Act** entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and for all Acts amendatory thereof or supplemental thereto, and of the Act **entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,** approved July second,eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available is hereby appropriated, out of any money in the Treasury not heretofore appropriated, **to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and**

(Footnote 3 continued next page)

limiting immunity as contended by Justice. The immunity is granted by a proviso in a paragraph of the Justice Department section of the bill which appropriates funds for enforcement of three specified Acts. Neither 15 U.S.C. 32, either as first passed or as amended by 15 U.S.C. 33, nor that amendment, indicate the immunity provision is not applicable in private antitrust actions. Although the appropriations bill authorized money" . . . to be expended under the direction of the Attorney-General . . . to conduct proceedings, suits, and prosecutions under said Acts . . . ," the immunity proviso is below and near the end of the paragraph in which it appears and provides that it be applicable ". . . in any proceeding, suit or prosecution under said Acts." (emphasis added) Thus, in the text above the immunity proviso Congress noted various legal actions available for antitrust enforcement and applied witness immunity to all without exception or limitation. The proviso applied to all three Acts, including the Sherman Act and "all acts, amendatory thereof or supplemental thereto," which, as Justice conceded in argument, includes private civil antitrust actions.

The immunity proviso in the appropriation bill was enacted in identical language in 15 U.S.C. 32 with no suggestion of limitations as Justice contends.

Legislative History.[4] When the next legislation on the subject, 15 U.S.C. 33, was considered and enacted, Congress deliberately and specifically excluded proposed language that

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(Footnote 3 continued)

prosecutions under said Acts in the Courts of the United States; Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts; Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." (emphasis added)

4. 40 Cong. Rec. 8738.

would have provided the immunity provision be restricted to " . . . a witness on the part of the Government." It is difficult to imagine legislative history more clearly indicating Congressional intent not to limit immunity as contended by Justice. Civil actions were authorized in the first antitrust law, the Sherman Act enacted in 1890, and ever since have been an important, effective and widely recognized means of enforcing the antitrust laws. In these circumstances it is inconceivable that Congress did not know, understand and intend what it was doing in rejecting the very proposed limitation which Justice now urges the Court to read into the immunity provisions of the statutes in question.

Decisional Authority. Only six cases have been cited to or found by this Court directly or indirectly relating to the above-stated question: *U.S. v. Monia*, 317 U.S. 424 (1943); *U.S. v. Welden*, 877 U.S. 95 (1964); *H. Wagner & Adler Co. v. Mali, et al.*, 74 F.2d 666 (2d Cir, 1939); *Rutherford v. U.S.*, 365 F. 2d 353 (9th Cir. 1966); *E. H. Rohde Leather Co. v. Duncan & Sons*, 15 F. 2d 103 (W. D. Wash. 1926); and *U.S. v. Dunham Concrete Products*, INC, ET AL (Unreported Order in #1842 E. D. La. 1970).

In Monie the Supreme Court did not consider whether 15 U.S.C. 33 applied in private antitrust actions but decided it is not necessary for subpoenaed witnesses before a grand jury to claim Fifth Amendment privilege against self incrimination in order to enjoy the immunity granted by the statutes in question and in Welden held 15 U.S.C. 32 applies only to persons testifying in judicial proceedings.

In **Wagner** the Second Circuit did not decide whether 15 U.S.C. 32 applied to private antitrust actions because the District Court had not considered the matter of incrimination.

In Rutherford the Ninth Circuit held the immunity pro-

visions in question applicable to a civil antitrust damage action instituted by the Government. The close and careful analysis of the immunity provisions and reasoning of the opinion at least inferentially support the view that the statutory immunity in question applies to all civil antitrust damage actions, whether brought by the Government or by private persons.

The District Court in Rohde, although referring to applicability of the immunity provisions in private antitrust actions, did not decide whether such provisions applied to private civil antitrust actions.

The unreported District Court order in **Dunham** denied immunity to a witness who testified by deposition in a private civil antitrust action. The **Dunham** order does not analyze the statutory language, makes no reference to the legislative history recited above and does little more than cite the other five decisions listed above. As previously stated, none of those decisions support the contention urged by Justice in the present case.

For the reasons above stated, this Court holds the immunity for witnesses granted by 15 U.S.C. 32 and 15 U.S.C. 33 apply to private antitrust actions.

Accordingly, the motion to vacate and rescind the immunity orders previously entered in this case is hereby denied.

DATED this 31st day of August, 1970.

s/ GEORGE H. BOLDT
UNITED STATES DISTRICT JUDGE

EXHIBIT H

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
MIDDLE DISTRICT OF LOUISIANA

ALTEX READY-MIX CONCRETE CORPORATION **Plaintiff** **vs.** **TED F. DUNHAM, EDWARD GRADY PARTIN, TED F. DUNHAM, JR., JOHSTON BARROW, LOUISIANA READY-MIX COMPANY, INC., and LONE STAR CEMENT CORPORATION** **Defendants**	**CIVIL ACTION NO. 67-41** **CERTIFICATE**

I, Charles H. Banta, Clerk of the United States District Court for the Middle Disrtict of Louisiana, do hereby certify that this action was filed on March 27, 1967; that the last hearing contradictory in Court was March 1, 1968, but on April 4, 1969, there was a hearing on plaintiff's motion to amend the complaint to dismiss Johnston Barrow; that the case has not been tried, but request for trial was filed February 1, 1968,

Baton Rouge, Louisiana
March 29, 1973.

s/ CHARLES H. BANTA
CHARLES H. BANTA, CLERK

APPENDIX I

UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT

NUMBER _____

UNITED STATES OF AMERICA
Plaintiff-Appellee

versus

DUNHAM CONCRETE PRODUCTS, INC.,
LOUISIANA READY-MIX COMPANY
ANDERSON-DUNHAM, INC.,
TED F. DUNHAM, JR.,
and
EDWARD GRADY PARTIN
Defendants

(Edward Grady Partin, Appellant)

APPEARANCES:

James D. Carriere, Esq.
Assistant United States Attorney
500 St. Louis Street
New Orleans, Louisiana 70130
Wilford Whitley, Esq.
Bruce A. Posnak, Esq.
Department of Justice
Washington, D.C.

Attorneys for the United States of America
Appellee

Edward M. Baldwin, Esq., and
Louis B. Merhige, Esq.
1360 Saratoga Building
212 Loyola Avenue
New Orleans, Louisiana 70112

Attorneys for Edward Grady Partin
Appellant

I agree. We will bring in another witness, your Honor.

WALLACE HECK (Page 172)

(8844 Graham Drive, Baton Rouge, Louisiana) having been previously sworn in this matter, was examined and testified as follows:

THE COURT:

In order to convenience the previous witness, Mr. Holland, as I understand it, there is no further use for him. May he be permanently excused?

MR. McPHERSON:

Yes, he may leave.

THE COURT:

Just notify him that he is excused.

Will you notify Mr. Holland that he is excused?

DIRECT EXAMINATION:

BY MR. McPHERSON:

Q What is your name, sir?

A Wallace Heck.

Q By whom are you employed, Mr. Heck?

A Myself.

Q And what business is that?

A I am in Altex Ready Mix, the furniture business, building materials.

Q Altex Ready Mix Corporation?

A Yes, sir.

Q You own that corporation?

A I own the stock, yes, sir.

Q You own all the stock?

A Well, it is in my family.

Q You and your family?

A That's correct.

Q That is the same Altex Ready Mix Concrete Corporation that was the party involved in the suit entitled ALTEX READY MIX CONCRETE CORPORATION versus TED F. DUNHAM, Jr., EDWARD GRADY PARTIN, ET ALS., Civil Action 67-41 filed in the Eastern District of Louisiana, Baton Rouge Division, United States District Court, is that correct?

A The suit is correct. I am not familiar with the number.

Q All right. You did file such a suit?

A Yes, sir.

Q In that suit, sir, you asked for damages for three million one hundred fifty thousand dollars, is that correct?

A Yes, sir.

Q Mr. Heck, in connection with your concrete business, did you ever have occasion to go to Washington, D.C.?

A Yes, sir, I have been to Washington.

Q How many times?

A Right at this time, I don't remember how many.

Q Sir?

A At this time I don't remember the exact number of times. I have been there several times.

Q Was it more than twice?

A Yes, sir, I think so.

Q When you went to Washington, with whom did you meet in Washington?

A Well, I met with several different people. Will you specify which time, the first time, the last time or what time?

Q Well, we will take them one at a time, if we may, sir. Your first trip to Washington, with whom did you go?

A On the first trip to Washington, I met with Mr. Paul Rand Dixon.

Q And where was this?

A United States Federal Trade Commission.

Q When was this?

A I can't give the exact date. I would say it was either sometime in 1967 or 1968.

Q Was it before you filed your three million dollar suit?

A No, sir, it was after.

Q It was after you filed your suit?

A I believe it was after.

Q When you met with Mr. Dixon, did you file charges against Mr. Dunham? Did you file charges against Mr. Dunham?

MR. WHITLEY:

We object. What does he mean by "filing charges"?

THE COURT:

I don't know. The witness - - I don't know, he has identified Mr. Dixon as with the Federal Trade Commission.

A I will answer the question. I don't know. Did I file

charges? All I asked them was to investigate the Baton Rouge situation. I certainly did.

Q Specifically what situation in Baton Rouge did you ask them to investigate?

A The situation of Lone Star Cement with Dunham Concrete Products.

Q This was after your civil suit was filed, is that correct?

A I am not absolutely sure. I think it was afterwards, but I'm not absolutely sure about it.

Q Did you have occasion to go to Washington again?

A Yes, sir.

Q When was that?

A Well, it was either the last part of '67 or the first part of '68.

Q Did you go by yourself or with anyone?

A No, sir, my attorney went with me.

Q Who was that?

A That was Mr. Drew McKinnis.

Q With whom did you all meet in Washington the second time?

A I am not really sure about whether it was the second trip or the third trip, but one time we met with the Attorney General.

Q Who was the Attorney General?

A Ramsey Clark.

Q Was anyone else present when you and your attorney met with Mr. Ramsey Clark?

A Yes, I believe Mr. Clegg, Mr. Holland and Mr. Roland Stevens and myself.

Q What did you all discuss?

A We discussed with Mr. Clark the situation concerning the ready mix business in Baton Rouge.

Q What - - you say the "situation", was it the situation that is outlined in your civil suit?

A Well, it involved the same matters partially, yes, sir.

Q Now, was Mr. Whitley present at this meeting, Mr. Heck? Do you know Mr. Whitley?

A Yes, sir, but I don't believe Mr. Whitley was present at this meeting.

Q When you met with Mr. Clark, was there anyone else present from the Department of Justice?

A I believe Mr. Zimmerman was there.

Q Mr. Who?

A Zimmerman; I believe that was his name.

Q Did you inform these gentlemen - - specifically the gentlemen from the Justice Department, that you had a civil suit against Mr. Dunham and Mr. Partin back in the Federal Court in Baton Rouge?

A Yes, sir.

Q You told them about it?

A Yes, sir.

Q Did you bring a copy of your petition with you?

A I don't remember.

Q Did you all discuss your civil suit?

A No, sir, we didn't discuss the civil suit. We were - - I

was discussing what was happening in Baton Rouge, in the ready mix business.

MR. WHITLEY:

Now I offer the same stipulation, your Honor. I will do anything that I can to help.

MR. McPHERSON:

Your Honor, I don't understand how Mr. Whitley can stipulate to a meeting at which the witness said Mr. Whitley was not even present.

MR. WHITLEY:

I will still stipulate.

THE COURT:

Go ahead.

BY MR. McPHERSON:

Q Mr. Heck, you are familiar with the contents of your three million dollar lawsuit, are you not, sir?

A It has been quite a while since we filed the suit; I am not familiar with it.

Q But at one time you were familiar with it?

A I was familiar with part of it, most of it.

Q You were familiar with it at the time that you had this meeting with Mr. Ramsey Clark and Mr. Zimmerman?

MR. WHITLEY:

I would object to this, your Honor, first is he asking the witness if he is familiar with the pleadings in the sense of a lawyer being familiar with pleadings, or is he familiar with

the facts and circumstances upon which the pleadings are based?

THE COURT:

I think that is the purport of the question. I understand he is not a lawyer and would not be as familiar as Mr. McKinnis to give opinions.

You were familiar with the facts surrounding the case that you brought, weren't you?

A Most of them, yes, sir.

Q But Mr. McKinnis would know about the suit actually.

A Im sure he would.

BY MR. McPHERSON:

Q But did you also discuss at this meeting - - Did you discuss the things that were covered in the lawsuit, that is the factual things?

MR. WHITLEY:

I object to that question.

THE COURT:

Overruled.

BY THE COURT:

When you talked to the Attorney General, did you talk to him about some of the facts that are alleged in your complaint?

A We talked to him about we needed some help in Baton Rouge to keep some of these things from going on, these strikes and other things, to try to help us run our business on

equal competition, and we felt that some laws were being violated and we would like to have some help.

BY MR. McPHERSON:

Q Did you receive any help?

MR. WHITLEY:

Objection to the characterization.

MR. McPHERSON:

Your Honor, I am characterizing in the same term that the witness phrased it in himself.

MR. WHITLEY:

I object to that, too.

THE COURT:

I will sustain the objection.

BY MR. McPHERSON:

Q At this meeting, sir, did you discuss price fixing of concrete in the Baton Rouge Area?

A The what, sir?

Q Price fixing of concrete in the Baton Rouge area?

A I didn't discuss any price fixing, but we discussed at that particular time the price of concrete was ten dollars fifty cents a yard in Baton Rouge. But I didn't discuss anything about price fixing.

Q I think maybe we can save time this way. Tell us in your own words what you discussed with Mr. Clark specifically?

A Well, to the best of my knowledge, we discussed about

Baton Rouge, about the ready mix concrete business; that there was a price war on in the ready-mix business in Baton Rouge at that time, and we also discussed the fact that Lone Star Cement Company made a loan to the Dunham concern and that this was part of our trouble - - we felt it was part of our trouble, because it give them a lot of extra operating capital to have the price war; and also we were having strikes and a lot of the strikes we didn't even know what they were for.

And we were also not able to pour any concrete at all down the river, regardless of what our price was. We'd start a job and then there would be a picket line on the job and nobody would know what it was for. And then later on they'd decide they have the wrong concrete, and otherwise even with purchase orders we got knocked off the job.

Q This picket line would be by what union?

A Well, on one particular job, Freepart Chemical, the picket line was put up by the Teamsters.

Q Sir?

A Put up by the Teamsters.

Q Mr. Partin's union.

A If you want to call it that; Local Number Five.

Q These are the matters that you discussed with Mr. Clark in Washington on this second meeting?

A To the best of my knowledge, yes, sir.

Q Now, did you make a third trip to Washington?

A I'm sure we made several more trips to Washington.

Q Did you meet withMr. Clark on more than one occasion?

A No, I only met with him on one occasion.

Q Now, you have described to me two meetings so far; you say there were more meetings. Who did you meet with on any of the other meetings?

A Well, actually, the meeting with Mr. Clark was not the second meeting. We had a meeting before that with Mr. Zimmerman. This was, I believe, the second trip we made we met with Mr. Zimmerman.

BY THE COURT:

Q So the meeting with Mr. Clark would be the third?

A The third or fourth. I'm not sure; I'm not absolutely positive which - - how many times.

BY MR. McPHERSON:

Q Was there a fifth trip?

A Oh, yes, sir.

Q Now, you said you only met with Mr. Clark on one occasion, is that right, at one of the meetings?

A That is right; I only saw him one time.

Q And met with Mr. Zimmerman on at least two or possibly more than that?

A At least two or three. I'm not - -

Q Did you ever meet with Mr. Whitley on any of these meetings?

A Mr. Whitley was in the second meeting.

Q Mr. Whitley was in the second meeting?

A That's correct.

Q Did you ever have any meetings after the second meeting when Mr. Whitley was not present?

A Yes, sir, the third meeting when I met with Mr. Clark, Mr. Whitley was not present.

Q And was Mr. Whitley present at all of the other meetings?

A I'm not absolutely sure on that. I think we had one other meeting where Mr. Whitley was not present.

Q One other meeting in which Mr. Whitley was not present?

A I'm not positive about that.

Q Now, Mr. Heck, in one of my previous questions, we were directing your attention to the meeting in which you met with Mr. Clark. I asked you if you brought a copy of your three million dollar law suit with you to that meeting and you said you didn't recall to be certain. Did you bring a copy of that lawsuit with you at any of these meetings?

A No, I myself did not. I did not bring a copy of it. Mr. McKinnis may have or one of the other attorneys, but I did not.

Q Did you, or your attorney, as far as you know bring any copies of any depositions with you people to any of these meetings?

A I believe on one meeting that we had with Paul Rand Dixon, I believe my attorney had a copy of the deposition, but I believe it was a Lone Star Cement Company deposition.

Q Could it have been the deposition of Mr. Dunham, Jr.?

A Not that I know of, no. I think it was of the Lone Star Cement Company.

Q You recall that was the deposition you brought with you?

A As far as I know, I didn't bring any; Mr. McKinnis

did. As far as to the best of my ability, I think that they were of Lone Star Cement Company depositions.

MR. WHITLEY:

I would like to renew my objection to relevancy of this line of interrogation. Once again, I want to agree with counsel that this lawsuit was brought to our attention. I can't see the relevancy of it.

THE COURT:

Overruled. Go ahead.

BY MR. McPHERSON:

Q Did you ever discuss the Bergeron incident with anyone in Washington? You know what I mean by the Bergeron incident, Mr. Heck?

A Not that I can recall, no, sir.

Q You don't recall having discussed this with anyone when you went to Washington?

A No.

Q Where did you discuss it?

A Well, I've discussed it with different contractors at the time it happened and people would walk in and we'd talk about it .

Q Did you ever discuss it with Mr. Whitley?

A Not that I remember talking to him.

Q Did you appear before a Grand Jury in New Orleans?

A Yes, sir.

MR. WHITLEY:

Objection, your Honor. Now we are getting into the area of Grand Jury matters and I am going to object to any questions - -

THE COURT:

He just asked him if he appeared and he said yes.

BY MR. McPHERSON:

Q And was this the New Orleans Grand Jury investigating Mr. Dunham and Mr. Partin?

MR. WHITLEY:

Same objection.

THE COURT:

Overruled.

THE WITNESS:

Do I go into that?

THE COURT:

Which Grand Jury did you appear before, that's all.

THE WITNESS:

I don't know that it had any particular name.

BY MR. McPHERSON:

Q When was it?

A I believe nineteen sixty - - I appeared before two grand juries. One of them was in 1968 and the other one I believe was in 1969.

Q These Grand Juries were both in New Orleans?

A Yes, sir.

MR. McPHERSON:

Excuse me one moment, your Honor.

BY MR. McPHERSON:

Q Mr. Heck, in order to clarify my own thinking, when I asked you did you appear before the New Orleans Grand

Jury, I will ask you, sir, did you testify before this Grand Jury?

A Yes.

Q And both of these apperances were after you had filed your civil suit?

A That's correct.

Q Were you granted immunity in conjuntion with your testimony before the Grand Jury?

MR. WHITLEY:
I object to that, your Honor, as being a legal conclusion.

THE COURT:
Sustained.

MR. McPHERSON:
That concludes my interrogation.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1722

TED F. DUNHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A. 2-20) is reported at 475 F. 2d 1241.

JURISDICTION

The judgment of the court of appeals (Pet. App. A. 1) was entered on March 23, 1973, and a timely petition for rehearing was denied on May 23, 1973 (477 F. 2d 596, Pet. App. C. 26). The petition for a writ of certiorari was filed on June 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a person who is deposed by the plaintiff in a private antitrust case thereby obtains immunity from prosecution, pursuant to the former Antitrust Immunity Statute.

2. Whether the government was "involved" in the taking of the depositions.

STATUTE INVOLVED

The former Antitrust Immunity Statute, 15 U.S.C. (1964 ed.) 32, is set forth at Pet. 3. That statute was enacted originally as a proviso to the general appropriations act of February 25, 1903, which provided in pertinent part (32 Stat. 854, 903-904):

> That for the enforcement of the provisions of the [Interstate Commerce] Act * * * the [Sherman] Act * * * and * * * [the antitrust provisions of the Wilson Tariff] Act, * * * the sum of five hundred thousand dollars * * * is hereby appropriated * * * to be expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits and prosecutions under said Acts in the courts of the United States: *Provided,* That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.[1]

STATEMENT

This petition seeks review of the judgment of the court of appeals affirming the petitioner's conviction

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[1] The portion following "*Provided*" became 15 U.S.C. (1964 ed.) 32.

for violations of Section 2 of the Sherman Act, 15 U.S.C. 2, and the Hobbs Act, 18 U.S.C. 1951.

A. The Offenses.

Petitioner Dunham is the manager and part owner of three concrete product companies in Baton Rouge, Louisiana (see Pet. App. A. 2-3). The evidence showed that he conspired with Edward Grady Partin, business manager of Teamsters Local No. 5, in an attempt to monopolize the Baton Rouge concrete products market. Partin agreed to cause labor trouble on construction jobs which did not use Dunham's products and Dunham agreed to pay Partin a fee for each cubic yard of concrete Dunham sold (App. 113-114).[2] This agreement resulted in numerous instances of labor difficulty which were not related to any legitimate labor grievance. It also resulted in the destruction of a competitor's concrete pipe in November 1967 (App. 132-134, 141-145) and an assault upon a contractor and his employees in January 1968 (App. 115-116, 134-140).

The assault occurred on January 17, 1968. When Dunham discovered that a contractor, W.O. Bergeron, was buying concrete pipe from a competitor, he called Partin and told him to "get down there and take care of him and I mean now" (App. 116). Partin sent some men to the jobsite to warn Bergeron to stop work. When Bergeron failed to heed the warning, the men returned to the Teamsters headquarters, assembled a larger crew, and equipped themselves with various

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[2] Partin was tried separately and the appeal from his conviction is now pending before the Court of Appeals for the Fifth Circuit. "App." refers to the joint appendix in the court of appeals in this case.

weapons. They then returned to the jobsite (App. 135-138).

Wade McClannahan, one of the participants in the incident, described the events at the jobsite as follows:

> We went out there and we had chains, we had ball bats, we had clubs and shotguns, and we put a pretty good whupping on the Bergeron crew. We run them off the job. W. O. Bergeron, he was shot, hit several times, and so was his employees. One colored fellow out there got hit in the hand and lost—I believe he lost a finger, maybe two fingers * * * I shot him [W. O. Bergeron] myself, and along with Mr. Sylvester. Mr. Sylvester shot him once and I shot him twice. [App. 138-139.]

Mr. McClannahan was paid $1,000, supplied by petitioner, for his activities at the Bergeron jobsite (App. 139). He was later convicted in state court for his part in the affair (App. 139-140).

B. The Civil Proceedings.

In February 1967 Altex Ready Mixed Concrete Corp., a Dunham competitor, filed a civil action against Dunham, Partin, and others seeking treble damages for antitrust violations. Dunham's deposition was taken by Altex on April 24 and July 11, 1967, and January 19, 1968 (App. 219-485). The third and last deposition, which was taken two days after the Bergeron incident, was confined to Dunham's business transactions with Bergeron and his knowledge of the incident. Dunham denied that he had any responsibility for the incident.

C. The Criminal Proceedings.

Altex representatives first approached the Antitrust Division of the Department of Justice in December

1967. An FBI investigation was requested on January 22, 1968, and a grand jury investigation was commenced on June 19, 1968 (Pet. 7). On June 20, 1969, a five count indictment was returned charging Dunham, Partin and three corporate defendants with attempting to monopolize trade in concrete products, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, and conspiring to affect commerce by attempting to obtain property through physical violence, in violation of the Hobbs Act, 18 U.S.C. 1951 (Pet. App. A. 2-3; App. 1-13).

Dunham moved to dismiss the indictment on the ground that he had received immunity from prosecution by virtue of his deposition testimony in the *Altex* suit. The district court denied the motion (Pet. App. B. 21). Dunham was subsequently found guilty on one Sherman Act count and one Hobbs Act count.

In affirming, the court of appeals opinion described the question presented as "whether a person, who testifies in a private civil antitrust suit in which the Government has no involvement, is entitled to immunity from criminal prosecution under 15 U.S.C.A. § 32" (Pet. App. A. 4). The court answered this question in the negative, holding "that Section 32 authorized immunity from criminal prosecution only to the extent that the Government actively acquiesced" (Pet. App. A. 10). Dunham filed a petition for rehearing which asserted that the government did have some "involvement" or "active acquiescence" in the *Altex* suit (Pet. 4). The court of appeals denied the petition (Pet. App. C. 26).

ARGUMENT

The decision below is correct and the petition does not present any question warranting review by this Court.

1. The decision below construes the former Antitrust Immunity Statute, 15 U.S.C. (1964 ed.) 32. This statute has been repealed and replaced by the immunity provisions of the Organized Crime Control Act of 1970, 18 U.S.C. 6001-6005. The Organized Crime Control Act provided that the former immunity provisions remain applicable to testimony given prior to December 15, 1970 (Section 260, 84 Stat. 922, 931-932). Thus, the questions raised can affect only the prosecution of persons who gave testimony in private antitrust actions prior to December 15, 1970, and the number of such persons is small.

2. The court of appeals correctly held that the former Antitrust Immunity Statute is not applicable to testimony given in private antitrust actions. As the court of appeals demonstrated, petitioner's construction of the immunity statute would be inconsistent with the wording of the statute (Pet. App. A. 5-7) and Congressional intent expressed in its legislative history (Pet. App. A. 7-8); would tend to defeat the Congressional purpose of strengthening antitrust enforcement (Pet. App. A. 8-10); and would be contrary to the views expressed by other courts (Pet. App. A. 10-11). We rely primarily on the thorough discussion by the court below, and add only the following observations:

Petitioner contends that the statute is applicable because the words "any proceeding, suit, or prosecution under sections 1-7 of this title" in 15 U.S.C. (1964 ed.) 32 are broad enough to cover private antitrust cases. This Court has previously held that the words "proceeding, suit, or prosecution" in the immunity proviso have the same meaning as the words "proceeding, suit or prosecution" in the body of the appropriation provision. *United States* v. *Welden*, 377 U.S. 95. The court of appeals found

that the words in the appropriation provision apply only to government suits and accordingly concluded that immunity is limited to testimony in government proceedings, suits, and prosecutions (Pet. App. A. 6-7).

The decision below does not conflict with the unreported order of the Court of Appeals for the Ninth Circuit in *United States* v. *Sabado-Ollero, Inc.* (Pet. App. F. 30). In that case the government filed a petition for a writ of mandamus shortly before the enactment of the Organized Crime Control Act of 1970, in order to prevent further testimony in reliance upon an erroneous order of the district court granting immunity under 15 U.S.C. (1964 ed.) 32. The potential witnesses could not assert any colorable claim of reliance on that order if they testified after the new immunity provisions became effective on December 15, 1970. The Ninth Circuit denied the petition for a writ of mandamus, but insured that a writ would be unnecessary by staying discovery until December 15.

The opinion below correctly observes that the *Sabado-Ollero* footnote reference to a witness who had testified in reliance on the district court's order granting immunity does not imply that the witness in fact had received immunity under 15 U.S.C. (1964 ed.) 32. The footnote merely indicates that the Ninth Circuit believed it would be unfair to prosecute a witness who testified in response to a court order (Pet. App. A. 12).[3]

3. Petitioner's assertion that the government was "involved" in the private litigation so that the immunity

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[3] Petitioner's reliance upon *Rutherford* v. *United States*, 365 F. 2d 353 (C.A. 9), certiorari denied, 385 U.S. 987, is also misplaced. The *Rutherford* case was a government antitrust suit.

statute should be applied to petitioner's deposition testimony is also unfounded. As previously noted, the first two depositions occurred several months before the private plaintiffs first communicated with the Antitrust Division. The third deposition, which occurred at 5:15 p.m. on Friday, January 19, 1968 (App. 462), was obviously prompted by the Bergeron incident on the preceding Wednesday, January 17. There is nothing to indicate or even suggest that the government was "involved" in any of these depositions.[4]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1973.

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[4] The government's memorandum of October 31, 1969, which petitioner quotes (Pet. 7), states (at p. 3): "However, at no time were counsel for the Government consulted by either the plaintiff or the defendants in the private suit as to any phase of the discovery to be undertaken."